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No. 08-___

IN THE

Supreme Court of the United States

RICARDO A. DE LOS SANTOS MORA,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
RICHARD A. BROWN, DISTRICT ATTORNEY, AND
FLUSHING QUEENS POLICE DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that local authorities "shall . . . inform" the appropriate consular post of the detention of a foreign national, "if he so requests," and "shall forward" any communication addressed to the consular post by that person. Article 36(1)(b) further provides that the authorities "shall inform" the person detained of "his rights under this subparagraph." The question presented is:

Whether Article 36(1)(b) grants a detained foreign national a judicially enforceable right to be informed of his entitlement to consular notification and communication.

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states as follows:

Appellant before the court of appeals was petitioner Ricardo A. de los Santos Mora.

Appellees before the court of appeals were the People of the State of New York, the Queens County District Attorney, and the New York City Police Department. App., *infra*, 16a. The caption used by petitioner in his complaint and by the court of appeals in its opinion refers to the New York City Police Department as the "Flushing Queens Police Department." *Id.* at 16a n.11.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricardo A. de los Santos Mora respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 524 F.3d 183 (2d Cir. 2008). The opinion of the district court (App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

Relevant provisions of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (1969), are set forth in the appendix to the petition (App. C).

STATEMENT OF THE CASE

Petitioner has alleged that respondents violated his right under Article 36(1)(b) the Vienna Convention to be informed of his entitlement to consular notification and communication. Consistent with the directive in the Convention that remedies are determined in the first instance by the law of the host country, *see* Article 36(2), petitioner seeks relief under, *inter alia*, 42 U.S.C. § 1983, for respondents' alleged violation of his treaty rights.

The court of appeals ruled against petitioner on the threshold ground that Article 36(1)(b) of the Vienna Convention does not confer on detained foreign

nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication. The court expressly declined to decide whether, if Article 36(1)(b) confers such a right, petitioner would be able to seek relief under § 1983 for respondents' violation of that right. This case therefore presents a single question: whether Article 36(1)(b) of the Vienna Convention confers on detained foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication.

This Court has previously granted certiorari to decide that question; there is a square conflict in the circuits on the question; the question is one of recurring national and international importance; the decision below is incorrect; and this case presents a favorable vehicle for resolving the issue. This Court should therefore grant review.

1. Because the courts below dismissed petitioner's complaint for failure to state a claim, the facts in the complaint must be assumed to be true for purposes of review. *Erickson v. Pardus*, 127 S. Ct. 2197, 2197 (2007) (per curiam). Those facts are as follows:

Petitioner is a native and citizen of the Dominican Republic. In 1991, petitioner immigrated to the United States. In 1992, petitioner was arrested in Queens, New York, and charged with attempted robbery. At the time of the arrest, petitioner did not speak English. App., *infra*, 15a.

Although petitioner told his arresting officers in Spanish that he did not understand their questions and that he wanted to speak with someone in Spanish, the arresting officers interrogated petitioner in

English. Petitioner later received court-appointed counsel, but that attorney did not speak Spanish either. Without the benefit of an interpreter, petitioner was coerced into pleading guilty. Petitioner was sentenced to six months of imprisonment and five years of probation. App. 15a.

The district attorney and the arresting officers knew that petitioner was a citizen of the Dominican Republic. App. 15a-16a. Under Article 36(1)(b) of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261 (1969), they were therefore obligated to inform petitioner that he was entitled to communicate with his home consulate. Yet petitioner was never informed that he could communicate with the Dominican consulate. App. 15a-16a.

2. Petitioner filed a *pro se* complaint in the United States District Court for the Eastern District of New York, alleging that respondents, the Queens County District Attorney and New York City Police Department, violated his rights under Article 36 "by failing to inform him that he could contact the Dominican consulate." App. 16a & n.11. Petitioner further alleged that if he "would [have] known of his Vienna Convention rights," then "[t]he outcome of [his] case would have been different." App. 16a. Petitioner also alleged that the failure to provide notice was a "serious error" that cost petitioner "his freedom." *Id.* Petitioner has not challenged the underlying criminal conviction, but instead has requested damages and other appropriate relief, including nominal damages. *See id.*; C.A. App. A6; Pet. C.A. Supp. Br. 6.

The district court dismissed petitioner's complaint for failure to state a claim upon which relief can be granted, holding that "[t]he Vienna Convention was meant to protect the rights of states to care for their nationals traveling abroad, not to protect the rights of individuals." App. 18a; *see also id.* at 61a. The court certified that any appeal from its order would not be taken in good faith. *Id.* at 62a.

Petitioner filed a timely notice of appeal, and the court of appeals appointed counsel to represent him. The court also invited the United States to file a brief as *amicus curiae*.

3. The court of appeals then affirmed. The court noted that "[o]ur sister Courts of Appeals are split" on the question whether the Vienna Convention confers judicially enforceable rights. App. 7a. The court explained that the Fifth, Sixth, and Ninth Circuits had held that "Article 36's obligation to inform aliens of their right to consular notification does not create judicially enforceable individual rights," while the Seventh Circuit had held that "Article 36 creates individual rights to be informed of consular notification and access that can be vindicated in a private action." *Id.* Agreeing with the position of the Fifth, Sixth, and Ninth Circuits, the court of appeals held that Article 36(1)(b) does not confer on detained foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication. *Id.* at 25a.

The court of appeals relied on two textual considerations in Article 36(1)(b) to support that conclusion. First, the court noted that, while at least some of the requirements in Article 36(1) "are explicitly referred to as rights," the entitlement to notice of

those rights "is never itself specifically referred to as a 'right.'" App. 23a. Second, the court found it significant that the Convention contains no express statement that "private individuals can seek redress for violations of this obligation—or any other obligation set forth in Article 36—in the domestic courts of States-parties." *Id.*

The court of appeals also relied on a statement in the preamble to the Convention noting generally that "the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79. That language, the court concluded, reflects a broad principle "that the Convention is concerned primarily, if not exclusively, with establishing relationships and rights as between States and State officials." App. 29a.

In addition, the court of appeals invoked a legal presumption "against inferring individual rights from treaties." App. 42a. In the court's view, the language of Article 36(1) was not sufficiently clear to overcome that presumption. *Id.* at 46a. The court of appeals also assigned "great weight" to the United States' view that that no provision of Article 36 creates a judicially enforceable individual right. *Id.*

The court of appeals recognized that the International Court of Justice (ICJ) had held that Article 36 grants foreign nationals an individual right to be notified that they may communicate with their home consulate, and that those rights may be "asserted . . . within the domestic legal system of the United States." *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 21); *see*

also LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("The clarity of these provisions, viewed in their context, admits of no doubt."). The court disagreed with the ICJ's conclusion, however, emphasizing that "[w]e are not bound . . . to give [the ICJ's] interpretation any particular weight when considering the text and context of a treaty." App. 51a.

Moreover, the court of appeals rejected petitioner's reliance on the references in the treaty's negotiating and drafting history (*travaux préparatoires*) to the "sacred rights" of foreign nationals to communicate with their consular officials. App. 54a. Those statements were unhelpful to petitioner, the court concluded, because they did not specify that those rights could be enforced by individuals in judicial proceedings. *Id.*

The court of appeals observed that, in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), this Court "'assum[ed], without deciding,' that Article 36 created a judicially-enforceable right to consular notification and access," and decided the case on the separate ground "that an exclusionary remedy was inappropriate." App. 35a-36a n.23. The court of appeals expressly declined to follow that approach, *i.e.*, that of "avoid[ing] the question whether the treaty create[s] an individual right." *Id.* Instead, the court held that Article 36 does not create an individual right, and specifically declined to reach the separate remedial question whether, if there were such a right, it could be vindicated in an action for damages under § 1983. *Id.*

In fact, the court stated that "assuming *arguendo* that [petitioner] has an individual right under the Convention, his claim for damages pursuant to

§ 1983 would likely be actionable" because "§ 1983 would likely provide a cause of action for damages in the case of a treaty violation in the same manner that [it] provides a cause of action for remedying a statutory violation." *Id.* Accordingly, while the court of appeals at certain points characterized its decision as addressing whether Article 36(1)(b) confers a judicially enforceable right that can be vindicated in an action for damages, *see, e.g.*, *id.* at 5a, 9a, 19a, the court in fact ultimately rested its decision solely on the determination that, even assuming any right conferred by Article 36(1)(b) could be vindicated in an action for damages under § 1983, Article 36(1)(b) fails as an antecedent matter to confer on a foreign national a judicially enforceable right to be informed of his entitlement to consular notification and communication. *Id.* at 20a-22a, 35a-36a n.23.

REASONS FOR GRANTING THE WRIT

In *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), this Court granted certiorari to decide the question "whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding." *Id.* at 2677. Because the Court concluded that the petitioners in that case would not be entitled to the relief they sought in any event, however, the Court did not resolve that fundamental threshold question. Instead, "it assumed, without deciding," that Article 36 grants foreign nationals "an enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification," and ruled against the petitioners on other grounds. *Id.*

Like *Sanchez-Llamas*, this case presents the question whether Article 36 confers on foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication. For the same reasons that the Court granted certiorari on that question in *Sanchez-Llamas*, it should also grant certiorari on that question here. Indeed, the importance of resolving that threshold question has only increased since the Court's decision in *Sanchez-Llamas*.

First, the decision below is in direct conflict with a decision of the Seventh Circuit, deepening an acknowledged circuit split. That conflict can only be resolved by this Court.

The issue is also one of substantial national and international importance. The issue "has arisen hundreds of times in the lower federal and state courts," *Sanchez-Llamas*, 126 S. Ct. at 2694 (Breyer, J., dissenting), evidencing a disturbing lack of compliance with Article 36's terms. *See Medellín v. Dretke*, 544 U.S. 660, 674 (2005) (O'Connor, J., dissenting) ("In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem.").

The decision below is also incorrect. As the four Justices who have addressed the question have concluded, Article 36 confers on foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication. *Sanchez-Llamas*, 126 S. Ct. at 2694-98. (Breyer, J., dissenting); *cf. Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (Article 36 "arguably confers on an individual the right to consular assistance following arrest").

Finally, this case provides a favorable vehicle for resolving that question because it is the only question presented by the petition. While petitioner has argued that he can vindicate his right through an action for damages under § 1983, the court of appeals declined to reach that question, and instead rested its decision solely on the absence of an individual right. This Court should therefore grant review and hold that a detained foreign national has a judicially enforceable right to be informed of his entitlement to consular notification and communication.

A. There Is A Conflict In The Circuits On The Question Presented

There is a square conflict in the circuits on the question presented in this case. The holding of the court below that Article 36 does not confer on foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication is consistent with the decisions of four other circuits. In particular, the Fifth, Sixth, Ninth, and Eleventh Circuits have held that Article 36 does not create judicially enforceable rights. *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) (rejecting argument that "Article 36 creates judicially enforceable rights"); *United States v. Emuegbunam*, 268 F.3d 377, 391-94 (6th Cir. 2001) ("[T]he Vienna Convention does not create a right for a detained foreign national to consult with the diplomatic representatives of his nation that the federal courts can enforce."); *Cornejo v. County of San Diego*, 504 F.3d 853, 855 (9th Cir. 2007) ("Article 36 does not create judicially enforceable rights."); *Gandara v. Bennett*, --- F.3d ---, 2008 WL 2130577, at *4-5 (11th Cir. May 22, 2008) ("[T]he Vienna Con-

vention does not confer enforceable individual rights.").

As the court below acknowledged (App. 7a), those decisions directly conflict with the Seventh Circuit's decision in *Jogi v. Voges*, 480 F.3d 822 (2007). In *Jogi*, the question presented was "whether a foreign national who is not informed of his right to consular notification under Article 36 of the Vienna Convention . . . has any individual remedy available to him in a U.S. court." *Id.* at 824. The Seventh Circuit resolved that question by squarely holding that "Article 36 confers individual rights on detained [foreign] nationals." *Id.* at 835. The court specifically relied on the language in Article 36 specifying that authorities "shall" inform a detained foreign national of "his rights." *Id.* at 833. The court explained that because this text emphasizes that Article 36 rights "are the citizen's," and because the language is "mandatory and unequivocal," Article 36 satisfies the test for the creation of judicially enforceable individual rights. *Id.*

Thus, in the Seventh Circuit, detained foreign nationals have a judicially enforceable right to be informed of their entitlement to consular notification and communication, while detained foreign nationals in the Second, Fifth, Sixth, Ninth, and Eleventh Circuits have no such right.

That circuit conflict is also firmly entrenched. Five circuits have held that Article 36(1) does not create judicially enforceable rights, and there is no realistic possibility that the Seventh Circuit will reconsider its position that Article 36(1) does create judicially enforceable rights. At the time the Seventh Circuit issued its unanimous decision in *Jogi*,

the Fifth and Sixth Circuits had already held that Article 36(1) does not confer judicially enforceable rights. Moreover, the Seventh Circuit's decision reflects a careful consideration of all the major arguments bearing on the question presented.

In addition, after the Seventh Circuit issued its initial decision in *Jogi* holding that Article 36(1) confers on foreign nationals judicially enforceable rights, the defendants sought rehearing en banc. The United States filed a brief as amicus curiae in support of that petition, arguing that Article 36(1) does not create judicially enforceable rights.[1] In response to the petition, no judge in the Seventh Circuit voted to grant rehearing en banc. *See Jogi*, 480 F.3d at 824-25 & n.*. Instead, the court issued a decision on rehearing unanimously reaffirming its initial conclusion that Article 36(1) confers judicially enforceable rights. Thus, there is an entrenched conflict in the circuits on the question presented that can only be resolved by this Court.

Nor does it matter that the circuits are aligned 5-1 in favor of the Second Circuit's position. The fact remains that foreign nationals have rights in one circuit that they do not have in others. That 5-1 alignment also masks a substantial division of opinion among the judges that have considered the question.

In particular, a number of judges have written concurring and dissenting opinions concluding that

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[1] *See* Br. of United States as *Amicus Curiae* in Support of Petition for Rehearing and Rehearing En Banc, at 6-10, *Jogi v. Voges*, No. 01-1657 (7th Cir. Nov. 16, 2005), *available at* http://www.ca7.uscourts.gov/efn/efns.fwx?submit=showbr&caseno=01-1657&shofile=01-1657_ 008.pdf.

Article 36(1)(b) creates a judicially enforceable right to be informed of the entitlement to consular notification and communication. For example, Judge Nelson has concluded that "foreign nationals have a right to be informed that the competent authorities are required upon request of the foreign national to notify the sending State of the arrest or detention" under the "clear language in Article 36(1)(b)." *Cornejo*, 504 F.3d at 864-73 (Nelson, J., dissenting). Judge Tourella has stated that "I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority." *United States v. Li*, 206 F.3d 56, 68-76 (1st Cir. 2000) (en banc) (Tourella, C.J., concurring in part and dissenting in part). And Judge Butzner has noted that "the text emphasizes that the right of consular notice and assistance is the citizen's" and this language is "mandatory and unequivocal." *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring), *aff'd sub nom.*, *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); *see also United States v. Lombera-Camorlinga*, 206 F.3d 882, 890 (9th Cir. 2000) (en banc) (Boochever, J., dissenting); *Gandara*, 2008 WL 2130577 at *5-12 (Rodgers, J., specially concurring).

Those opinions underscore what the Eleventh Circuit acknowledged even while ultimately concluding that Article 36(1)(b) fails to confer judicially enforceable rights: that the "arguments in favor of individual rights under the Treaty are impressive." *Gandara*, 20008 WL 2130577, at *3. Indeed, the

four Justices of this Court who have addressed the question presented in this case have all concluded that Article 36(1) creates judicially enforceable rights. *Sanchez-Llamas*, 126 S. Ct. at 2694-98 (Breyer, J., dissenting). Given the division in the circuits and the division in judicial opinion on the question presented, this Court's review is warranted.

B. The Question Presented Is One Of Recurring National And International Importance

The question whether Article 36 creates judicially enforceable individual rights "has arisen hundreds of times in the lower federal and state courts." *Sanchez-Llamas*, 126 S. Ct. at 2694 (Breyer, J., dissenting). That litigation attests to the recurring importance of the question presented.

Those cases also reflect a disturbing reality: despite the efforts of the federal government, *see* App. 31a n.22, notifying arrested foreign nationals of their rights under the Article 36 has been the exception, rather than the rule, in the United States. An examination of New York City arrest records from 1997 revealed that 53,000 foreign nationals were arrested, but consulates were notified of the arrests in only four cases.[2] Even in capital cases, less than *five percent* of foreign nationals sentenced to death received timely notification of their rights under Article 36.[3] Because of the "vexing problem" of state and

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[2] Mark Warren, *Human Rights Research, Foreign Nationals and the Death Penalty in the United States* (updated Feb. 29, 2008), *available at* http://www.deathpenaltyinfo.org/article.php?did=198&scid=31.

[3] *Id.* (concluding that "only 7 cases of complete compliance with Article 36 requirements have been identified so far, out of more than 160 total reported death sentences"); *see*

local authorities' "(often confessed) noncompliance" with Article 36, such cases present "questions that will inevitably recur." *Medellín*, 544 U.S. at 674-75 (O'Connor, J., dissenting).

There is no evidence that compliance with the obligations in Article 36(1) has substantially improved since this Court's decision in *Sanchez-Llamas*. Moreover, in the two years since *Sanchez-Llamas*, the question whether Article 36(1) creates judicially enforceable rights has continued to arise with regularity. *See, e.g.*, App. 16a n.12 (citing cases); *Gandara*, 2008 WL 2130577; *Lopez v. Wallace*, 266 Fed. App'x 882, 883 (11th Cir. 2008); *Cornejo*, 504 F.3d at 854-55.[4] The frequent litigation confirms the continuing importance of the issue.

This Court's responsibility to ensure the uniform interpretation and application of federal law is particularly important in this context. As five nations that are signatories to the Vienna Convention explained in urging the Court to grant review in the companion case to *Sanchez-Llamas*: "When nations

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also Amnesty International, *United States of America: A time for action – Protecting the consular rights of foreign nationals facing the death penalty*, at 4 (Aug. 2001).

[4] *See also, e.g.*, *Gomez v. Cal. Bd. of Prison Terms*, 2008 WL 1946540, at *1 (E.D. Cal. May 1, 2008); *Leka v. United States*, 2008 WL 686797, at *2 (N.D.N.Y. Mar. 10, 2008); *Gardner v. Meggs*, 2007 WL 3231734, at *1-2 (N.D. Fla. Oct. 30, 2007); *Christ v. Detroit Police Dep't*, 2007 WL 2050793, at *2 (E.D. Mich. July 13, 2007); *Jacko v. Mich. State Police*, 2007 WL 1017648, at *2 (E.D. Mich. Mar. 30, 2007); *Keszthelyi v. Bowman*, 2007 WL 626221, at *4 (E.D. Tenn. Feb. 23, 2007); *Gamez-Reyes v. Dobre*, 2007 WL 954238, at *3 (E.D. Tex. Mar. 26, 2007).

such as *amici* treat with the United States on important matters such as the right to consular notification, it is essential that they have assurance that the United States will be able to ensure compliance with its treaty obligations by all organs of the government. . . . [C]onflicting judicial decisions on the application and interpretation of a treaty undermine this assurance." Br. of Honduras, et al. as *Amici Curiae*, *Bustillo v. Johnson*, No. 05-51, at 11 (Sept. 23, 2005), *available at* 2005 WL 2376680.

The question presented is therefore one of recurring national and international importance. "[G]iven its importance," *Sanchez-Llamas*, 26 S. Ct. at 2694 (Breyer, J., dissenting), review is warranted.

C. The Court Of Appeals' Decision Is Incorrect

Review is also warranted because the court of appeals' decision is incorrect. As four Justices of this Court have concluded, Article 36(1)(b) grants detained foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication. *Sanchez-Llamas*, 126 S. Ct. at 2694-98 (Breyer, J., dissenting).

1. In determining whether a treaty creates a judicially enforceable right, the Court begins with an examination of the text. *United States v. Alvarez-Machain*, 504 U.S. 655, 661 (1992). Subparagraph 1(b) of Article 36 provides as follows:

> [I]f he so requests, the competent authorities of the receiving State *shall, without delay, inform* the consular post of the sending State if, within its consular district, a national of that State is arrested . . . or is detained in any other manner. Any communication addressed to the consular post by the person ar-

> rested . . . *shall also be forwarded* by the said authorities without delay. The said authorities *shall inform* the person concerned without delay of *his rights* under this sub-paragraph.

21 U.S.T. at 101 (emphasis added).

That language establishes that Article 36(1)(b) creates three judicially enforceable rights. Each sentence of the subparagraph uses mandatory language ("shall") and expressly links the duty described to the detained foreign national ("if he so requests," "communication . . . by the person arrested," "inform the person concerned"). The final sentence uses not only the term "rights," but also the possessive adjective "his," making clear that the rights belong to "the person" arrested or detained. Thus, the plain language of Article 36(1) creates judicially enforceable rights. *Sanchez-Llamas*, 126 S. Ct. at 2694-98 (Breyer, J., dissenting).

This Court's approach to deciding whether a statute creates a judicially enforceable right confirms that conclusion. In that context, this Court asks whether the statute uses "rights-creating" language—language that is both mandatory and "individually focused." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3, 287 (2002); *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979). Because Article 36(1) uses language that is both mandatory and individually focused, applying that approach here leads to the conclusion that Article 36(1) creates judicially enforceable rights.

2. The court of appeals' reasons for reaching a contrary conclusion are unpersuasive. First, the court concluded that, while "at least some of the[] requirements [of subparagraph (1)(b)] are explicitly

referred to as 'rights' of the individual foreign nationals, . . . a receiving State's obligation to inform a detained foreign national of his 'rights' under paragraph 1(b)" is "never *itself* expressly referred to as a 'right.' App. 23a. (emphasis added).

That distinction is untenable. All three sentences share the same structure, describing what local authorities "shall" do. The first and third sentences even use the same verb: the authorities *shall inform* the consulate of the arrest upon request, and *shall inform* the arrested person of his rights. Moreover, all three sentences frame the obligation as one running to a specific class of detained foreign nationals. The common structure of the three sentences establishes that they have a common effect, and that all three create judicially enforceable rights.

Indeed, the provision establishing a duty to inform foreign nationals of their entitlement to consulate notification and communication is especially clear in creating a judicially enforceable individual right. While the first two obligations refer to the right of both the detained individual and the consulate, the obligation to inform a foreign national of his rights "exclusively concerns the detained individual." *Medellín*, 544 U.S. at 687 (O'Connor, J., dissenting).

Furthermore, obligations to provide notice of other rights are readily understood as creating rights themselves. As Justice O'Conner has explained, if a statute required "that arresting authorities 'shall inform a detained person without delay of his right to counsel,'" it is difficult to imagine what "more would be required before a defendant could invoke that statute to complain in court if he had not been so informed." *Id.*

The court of appeals' distinction also makes little sense. There is no plausible reason to confer on a foreign national a judicially enforceable right both to consular notification and to consular communication, only to deny judicial enforcement of the closely related entitlement to be informed of those rights, and to require resort to claims by national governments in the international arena. That is particularly true because when, as here, a foreign national is unaware of his rights to consular notification and communication, a violation of his right to notice operates as a denial of the other two rights. The court of appeals offered no reason why the parties to a treaty would create such an incoherent scheme.

The court of appeals also erred in emphasizing the absence of an express statement in the treaty to the effect that "private individuals can seek redress for violations of this obligation . . . *in the domestic courts* of States-parties." App. 23a (emphasis added). This Court "has repeatedly enforced treaty-based rights of individual foreigners" based on treaties that "do not share any special magic words." *Medellín*, 544 U.S. at 687 (O'Connor, J., dissenting). For example, in *Kolovrat v. Oregon*, 366 U.S. 187, 192 (1961), the Court held that a treaty provision that conferred on foreign nationals "rights which the [United States] laws grant" created a judicially enforceable individual right. Similarly, in *Asakura v. Seattle*, 265 U.S. 332, 340 (1924), the Court held that a treaty provision granting foreign nationals "liberty . . . to carry on trade . . . upon the same terms as native citizens or subjects" created a judicially enforceable individual right. Neither of those treaties expressly referred to "domestic courts" or judicial en-

forcement. *See Medellín*, 544 U.S. at 687 (O'Connor, J., dissenting).

The court of appeals' insistence on such language is particularly inappropriate in the context of the Vienna Convention because Article 36(2) of the Convention provides that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State," provided that "the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U.S.T. at 101. As the Court explained in *Sanchez-Llamas*, that provision makes clear that the Vienna Convention "expressly leaves" the remedies for violation of the rights protected by Article 36 to "domestic law." 126 S. Ct. at 2678.

The court of appeals (App. 29a-30a) also relied on the language in the Convention's preamble stating that the "purpose" of the consular privileges and immunities described in the treaty "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79. The general language of a preamble, however, cannot trump the plain language of Article 36(1). *Jogi*, 480 F.3d at 834; *cf. District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008) (a prefatory clause "does not limit or expand the scope of the operative clause"). In any event, the preamble is not in any tension with the conclusion that Article 36(1) creates judicially enforceable rights. Granting foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication plainly advances the purpose of ensuring "the efficient per-

formance of functions by consular posts." 21 U.S.T. at 79.

3. Other considerations also support the conclusion that Article 36(1) creates judicially enforceable individual rights. In *LaGrand*, the ICJ found it "[s]ignificant[]" that subparagraph 1(b) obligates authorities to inform an arrested person of "his rights" and that paragraph 1(c) allows the person to refuse consular assistance by "expressly oppos[ing] such action." 2001 I.C.J. at 494. The court concluded that "[t]he clarity of these provisions, viewed in their context, admits of no doubt" and that the rights belong to individuals. *Id.* In *Avena*, the court further held that "the individual rights of nationals under paragraph 1 (b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States." 2004 I.C.J. at 35. As an "interpretation of an international agreement by an international court," those decisions are entitled to "respectful consideration" by United States courts. *Sanchez-Llamas*, 126 S. Ct. at 2685 (internal quotation marks omitted).

The negotiating and drafting history (*travaux préparatoires*) of Article 36 reinforce the conclusion that the drafters intended to confer judicially enforceable rights on foreign nationals. *See, e.g.*, 1 Official Records, United Nations Conference on Consular Relations 338 (1963) ("Official Records") (statement of Korea) (calling Article 36(1)(b) "extremely important because it relate[s] to one of the fundamental and indispensable rights of the individual"); *id.* at 332 (statement of Spain) ("the rights of the nationals of a sending State" to consular access are among "the most sacred rights of foreign residents in

a country"). Indeed, some delegates opposed the language of Article 36(1)(b)—and unsuccessfully attempted to amend it to omit any mention of individual rights—precisely because it "introduced a novelty to the convention by defining the rights of the nationals of the sending States and not . . . the rights of consular officials." *Id.* (statement of Kuwait); *see* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 596 (1997).

In addition, this Court has held that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940). This Court has consistently followed that principle of treaty construction for two centuries. *See United States v. Stuart*, 489 U.S. 353, 366 (1989); *Kolovrat*, 366 U.S. at 193; *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483, 487 (1880); *Shanks v. Dupont*, 28 U.S. (3 Peters) 242, 249 (1830). As Justice Story put it for the Court in *Shanks*: "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?" 28 U.S. at 249. Thus, even if Article 36(1) were ambiguous, it should be interpreted to create judicially enforceable rights.

4. The court of appeals held that there is a presumption against treaties creating judicially enforceable rights that can be overcome only by a clear showing that the drafters intended to "confer rights that could be vindicated in the manner sought by the affected individuals." App. 45a. That clear state-

ment rule is inconsistent with the principle of liberal construction articulated by Justice Story, and this Court has never adopted it. *See Sanchez-Llamas*, 126 S. Ct. at 2697 (Breyer, J., dissenting) ("The problem with that argument is that no such presumption exists."). Even if treaties generally do not create judicially enforceable rights, there is no basis for denying judicial enforceability in circumstances in which, as with Article 36(1)(b), the terms of the treaty invoke mandatory, rights-creating language directed to a specific class of individuals. Decisions like *Kolovrat* and *Asakura* demonstrate that the treaty language in Article 36(1) is sufficiently clear to create judicially enforceable rights.

Finally, the court of appeals assigned "great weight" to the government's position that Article 36 creates no individual rights that can be invoked in court under any circumstances. App. 46a. This Court, however, has not hesitated to reject the government's interpretation of a treaty when, as here, it is contrary to the text of the treaty. *See Perkins v. Elg*, 307 U.S. 325, 328, 337-42 (1939); *Johnson v. Browne*, 205 U.S. 309, 319-21 (1907); *De Lima v. Bidwell*, 182 U.S. 1, 181, 194-99 (1901). As Justice Breyer stated for four members of this Court in *Sanchez-Llamas*: Because the "language, the nature of the right, and the ICJ's interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights upon an individual, I cannot find in the simple fact of the Executive Branch's contrary view sufficient reason to adopt the Government's interpretation of the Convention." 126 S. Ct. at 2698 (Breyer, J., dissenting).

D. This Case Presents A Favorable Vehicle For Review Of The Question Presented

This case presents a favorable vehicle for resolving the question whether Article 36 confers on foreign nationals a judicially enforceable right to be informed of the entitlement to consular notification and communication. Petitioner's complaint expressly alleges that respondents failed to inform him of his right to contact his consulate, in violation of his rights under Article 36 of the Vienna Convention. Because petitioner's complaint was dismissed for failure to state a claim, petitioner's allegation must be accepted as true for purposes of review. *Erickson*, 127 S. Ct. at 2197.

Moreover, the court below ruled against petitioner solely on the ground that Article 36 does not confer on foreign nationals a judicially enforceable right to be informed of the their entitlement to consular notification and communication. App. 20a-22a, 35a-36a n.23. The court expressly declined to reach the question whether, if Article 36 does confer such a right, petitioner may seek damages under 42 U.S.C. § 1983. *Id.* at 35a-36a n.23. Thus, this case squarely presents only the threshold question whether Article 36 confers on foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication.

There is also nothing to be gained by awaiting further development in the lower courts. Six circuits have now issued decisions resolving the question presented. Those circuits cover the overwhelming majority of states with a high concentration of for-

eign-born residents.[5] Moreover, those decisions have thoroughly canvassed all the arguments bearing on the proper resolution of the question. This Court should therefore grant review to resolve the important threshold question whether Article 36(1) confers on foreign nationals a judicially enforceable right to be informed of their entitlement to consular notification and communication.

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[5] *See* U.S. Census Bureau, *The Foreign-Born Population: 2000* at 3 (Dec. 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (as of 2000, the five states with the highest population of foreign-born residents are California (8.8 million), New York (3.8 million), Texas (2.8 million), Florida (2.6 million), and Illinois (1.5 million)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 23, 2008

APPENDIX A

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: April 9, 2007 Decided: April 24, 2008
Errata filed: May 12, 2008)

Docket No. 06-0341-pr.

RICARDO A. DE LOS SANTOS MORA,

Plaintiff-Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK, RICHARD A. BROWN, District Att., FLUSHING QUEENS POLICE DEPT.,

Defendants-Appellees.

Before: LEVAL, CABRANES, and RAGGI,
Circuit Judges.

Plaintiff, a foreign national who alleges that defendants violated Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention") by failing to notify him that he could contact his consulate after having been arrested, appeals from a judgment of the United States

District Court for the Eastern District of New York (Raymond J. Dearie, *Judge*) dismissing his complaint, which sought $1 million in damages under the Alien Tort Statute ("ATS"). Pursuant to 28 U.S.C. § 1915A, which governs complaints filed by prisoners in civil actions, the District Court *sua sponte* determined that plaintiff failed to state a claim upon which relief can be granted because Article 36 does not confer individual rights that can be enforced in domestic courts. On appeal, plaintiff argues that the requirement of Article 36 that States-parties inform an alien of the availability of consular notification and access creates individual rights that can be vindicated by an action for damages not only through the ATS, but also through 42 U.S.C. § 1983 and an implied private right of action provided for by the Vienna Convention itself. We conclude, however, that a State-party's failure to fulfill its obligation to inform a detained alien of the prospect of consular notification and access, pursuant to Article 36, cannot form the basis for such a suit under the ATS, § 1983, or directly under the Vienna Convention.

Affirmed.

MICHAEL DOVER, JAE LEE [1] (Irena Nikolic, Jon Romberg, *on the brief*), Seton Hall University School of Law, Center for Social Justice, Newark, NJ, *for Plaintiff-Appellant*.

ALAN BECKOFF, Assistant Corporation Counsel (Michael A. Cardozo, Corporation Counsel of

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[1] Law students appearing pursuant to Local Rule 46(e).

the City of New York, Leonard Koerner, Assistant Corporation Counsel, *on the brief*), New York City Law Department, New York, NY, *for Defendants-Appellees*.

SHARON SWINGLE, Attorney, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC (James H. Thessin, Acting Legal Adviser, United States Department of State, Washington, DC; Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, DC; Roslynn R. Mauskopf, United States Attorney, United States Attorney's Office for the Eastern District of New York, Brooklyn, NY; Douglas N. Letter, Attorney, Robert M. Loeb, Attorney, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, *on the brief*), *for Amicus the United States in Support of Defendants-Appellees*.

JOSÉ A. CABRANES, *Circuit Judge*:

This appeal concerns obligations imposed by Article 36 of the Vienna Convention on Consular Relations ("the Vienna Convention" or "the Convention"), Apr. 24, 1963, [1970] 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820. When a national of one country is detained by authorities in another country, paragraph 1 of Article 36 imposes several requirements. Paragraph 1(b) contains three obligations: (1) "the authorities must notify the consular officers of the detainee's home country if the detainee so requests"; (2) any communication to the consular officials by a detained alien "shall also

be forwarded by the said authorities without delay"; and (3) the detaining authorities "shall inform the person concerned without delay of his rights under this sub-paragraph." 21 U.S.T. at 101-02. Under paragraph 1(c), consular officials of the state of the detained alien "shall have the right to visit." We consider here the third of the paragraph 1(b) requirements-the obligation of States-parties to inform a detained alien of the availability of consular notification and access.[2]

For three decades after the ratification of the Convention by the United States in 1963, it appears that no claim was asserted that the Convention generally, or Article 36(1)(b)(third) in particular, conferred rights upon individuals that could be enforced in our domestic courts, as distinguished from the customary claims of treaty violations asserted by and between States-parties in their international relations. Understandably, a passing suggestion by the Supreme Court in *Breard v. Greene*, 523 U.S. 371, 376, 118 S. Ct. 1352 (1998)

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[2] In *Sanchez-Llamas v. Oregon*, 548 U.S. 331, —, 126 S. Ct. 2669, 2675 (2006), the Supreme Court referred to two requirements imposed by Article 36(1)(b) by eliding the first and second sentences of Article 36. Because the three sentences of Article 36(1)(b) impose three distinct sets of obligations, we will refer to them as Art. 36(1)(b)(first) (the detaining authority's obligation to notify the detainee's consulate if the detainee so requests), Art. 36(1)(b) 'second) (any communication to the consular officers by the detainee shall be forwarded by authorities without delay), and Art. 36(1)(b)(third) (the detaining authority's obligation to inform a detainee of the availability of consular notification and access).

(per curiam), that the Convention "arguably confers on an individual the right to consular assistance following arrest," triggered an outpouring of conflicting case law on various permutations of the broad question of whether the Convention confers upon individuals *any* rights that can be enforced in our courts. The particular settings in which this broad question has arisen are many, and some are set forth in the margin.[3] We consider here only the narrow question of whether a detained alien may vindicate in an action for damages the failure of the detaining authority to inform him of the availability

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[3] Other courts have considered violations of Article 36 in a variety of contexts. *See, e.g.*, *Medellín v. Texas*, 552 U.S. —, 128 S. Ct. 1346 (2008) (enforcement in state courts of the judgment of the International Court of Justice concerning Article 36 violations); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, (2006) (suppression of evidence, in *habeas corpus* proceeding); *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007) (claim for damages); *Jogi v. Voges*, 480 F.3d 822, 835 (7th Cir. 2007) (on petition for rehearing) (claim for damages); *United States v. Emuegbunam*, 268 F.3d 377, 388-94 (6th Cir. 2001) (dismissal of indictment and reversal of conviction); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) (suppression of statement); *United States v. Santos*, 235 F.3d 1105, 1106-08 (8th Cir. 2000) (suppression of confession and reversal of conviction); *United States v. Li*, 206 F.3d 56 (1 st Cir. 2000) (en banc) (suppression of confession and dismissal of indictment). Our own court has considered an ineffective assistance of counsel claim based on counsel's failure to move to dismiss an indictment on the basis of violations of Article 36. *United States v. De La Pava*, 268 F.3d 157, 163-66 (2d Cir. 2001).

of consular notification and access.[4] For the reasons set forth below, we conclude that no such action can be maintained.

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[4] We hasten to note some of the questions that we need not, and do not, reach in order to decide the narrow question presented by this lawsuit. First of all, we have no occasion here to consider, much less resolve, the general and difficult question of whether there are any other circumstances in which courts could entertain an individual right of action under the Convention. We do not consider whether a detaining authority's refusal to comply with the first set of requirements of Article 36(1)(b)–by refusing to notify the consulate at the request of the detained alien-would present such circumstances, *see* Art. 36(1)(b)(first). We do not consider whether at the insistence of a detained alien a court may order such a recalcitrant detaining authority to notify the consulate of his detention or to send a communication from a detained alien to his consulate, *see* Art. 36(1)(b)(first)-(second); or direct a recalcitrant detaining authority to permit a consular official to visit a detained alien or otherwise allow the consular official to communicate with the detained alien, *see id.;* or order notification of obligations owed when a detained alien, who knows that obligations are owed but does not know exactly what they are, asks to be informed with specificity, *see* Art. 36(1)(b)(third). And finally, we do not consider whether a detaining authority that gives 70automatic notification to the consular post of arrested aliens (before asking for the consent of the detained alien) presents a case in which courts could entertain an individual action for violations of the Convention. In identifying questions that we have not considered here, we underscore that we intimate no view on the merits of such questions.

Similar questions have arisen both in the context of civil suits for damages by foreign nationals, such as the case presented here, and in the context of criminal trials and postconviction proceedings involving foreign nationals, *see* note 3 *ante*. The Supreme Court has thus far avoided answering those questions, *see Medellín v. Texas*, 552 U.S. —, — n.4, 128 S. Ct. 1346, 1357 n.4 (assuming, without deciding, that Article 36 creates judicially enforceable individual rights); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, —, 126 S. Ct. 2669, 2677-78 (2006) (same), although four Justices have expressed the view that these questions should be answered in the affirmative, *see id.* at 2693-98 (Breyer, J., dissenting, joined by Stevens, Souter, & Ginsburg, JJ.). Our sister Courts of Appeals are split. *Compare Cornejo v. County of San Diego*, 504 F.3d 853, 859-64 (9th Cir. 2007) (concluding that Article 36's obligation to inform aliens of their right to consular notification does not create judicially enforceable individual rights), *United States v. Emuegbunam*, 268 F.3d 377, 391-94 (6th Cir. 2001) (same), *and United States v. Jimenez-Nava*, 243 F.3d 192, 196-98 (5th Cir. 2001) (same), *with Jogi v. Voges*, 480 F.3d 822, 834-35 (7th Cir. 2007) (concluding that Article 36 creates individual rights to be informed of consular notification and access that can be vindicated in a private action). And in cases where the majority did not reach the question, non-majority opinions reflect similarly divergent conclusions. *Compare United States v. Santos*, 235 F.3d 1105, 1109 (8th Cir. 2000) (Beam, J., concurring) (concluding that Article 36 does not create a judicially enforceable individual right to be informed of a right to consular notification upon arrest), *and*

United States v. Li, 206 F.3d 56, 66-68 (1 st Cir. 2000) (en banc) (Selya & Boudin, JJ., concurring) (same), *with Li*, 206 F.3d at 68-76 (Torruella, J., concurring in part and dissenting in part) (concluding that Article 36 creates a judicially enforceable individual right to be advised about the prospect of consular assistance).

Our Court has yet to speak definitively on the question. In *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001), an appeal from a criminal conviction, we considered whether it was necessary to vacate a conviction where the defendant argued that he had received ineffective assistance of counsel because his lawyer had not moved to dismiss the indictment on the basis of an alleged violation of Article 36(1)(b)(third), *id.* at 163. We determined that a violation of Article 36's obligation to inform aliens of the prospect of consular notification and access does not provide a basis for the dismissal of an indictment, and therefore it is not ineffective assistance of counsel for a lawyer not to request dismissal on this basis. *See id.* at 165-66.

We are thus required to consider the thoughtful, if conflicting, arguments of some of our colleagues elsewhere in the federal courts. For the reasons stated below, and in keeping with the apparent practices of the other States-parties to the Convention,[5] we conclude that Article 36's obligation

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[5] We requested that *amicus* the United States provide us with information regarding the judicial enforcement of alleged individual rights in the domestic courts of other States-parties to the Convention. The United States has informed us that in January 2007, the U.S. Department

to inform detained aliens of the prospect of consular notification and access cannot, when violated, be vindicated by a private action for damages filed in our courts. We find that the text of the Vienna Convention and its context make clear that Article 36(1)(b)(third) does not afford detained aliens with individual rights that they can assert through such litigation. Interpretive principles, such as the presumption that treaties do not create privately enforceable rights in the absence of express language to the contrary, counsel against such an

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of State surveyed U.S. embassies worldwide, asking "can an individual sue in court if he or she did not receive consular notification and/or access?" *Amicus*'s May 11, 2007 Supp. Letter Br. 2. The State Department received 96 responses, representing 91 of the 170 countries party to the Convention. "With one possible exception," the State Department was unable to identify any country in which an individual litigant could sue for money damages for violation of the consular notification and access provisions in Article 36. *Id.* And "with a handful of possible exceptions," no other country's courts "have construed the consular notification requirements of the Convention to create privately enforceable individual rights." *Id.* Moreover, although the governments of 36 countries, acting as *amici* in a companion case to *Sanchez-Llamas*, expressed the view that Article 36 creates judicially enforceable individual rights to be informed of the prospect of consular notification and access, they did not identify any statutory authority or administrative or judicial proceedings in their own countries affording individuals the rights they assert are available to detained aliens in the courts of the United States. *Id.* at 2 n.3.

interpretation here. *See Medellín*, 552 U.S. at — n.3, 128 S. Ct. at 1357 n.3 (collecting cases in the court of appeals acknowledging such a presumption). Pursuant to the instructions of the Supreme Court with respect to the deference owed to the views of the Executive on issues of treaty interpretation, we accord "great weight," *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184, 102 S. Ct. 2374 (1982), to the settled view of the Executive under successive national administrations. *See Li*, 206 F.3d at 63 (noting in 2000, during the Clinton Administration, the view of the Executive that the Vienna Convention does not create individual rights); *id.* at 63-64 (charting the views of the Executive since 1970); *see also Amicus's* Br. 5; note 28 *post.* Finally, the views of the International Court of Justice ("ICJ") on this issue do not persuade us otherwise. We further conclude that plaintiff's claims for violation of Article 36(1)(b)(third) do not give rise to a cause of action under the Alien Tort Statute.

The judgment of the United States District Court for the Eastern District of New York (Raymond J. Dearie, *Judge*), which dismissed plaintiff-appellant's complaint pursuant to 28 U.S.C. § 1915A[6] for failure

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[6] Section 1915A states that a district court "shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A (a). The court "shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint . . . fails to state a claim upon which relief may be granted." *Id.* § 1915A(b). At all times relevant to the procedural history

to state a claim upon which relief can be granted, is therefore affirmed.

BACKGROUND

A. The Vienna Convention

The Vienna Convention is the product of the United Nations Conference on Consular Relations ("the Conference"), which met in the capital of Austria in March and April of 1963. Working from a draft prepared by the International Law Commission,[7] representatives from the governments of 92 countries, including the United States, came together to draft the final document. *See generally* Luke T. Lee, *Vienna Convention on Consular Relations* 15-18 (1966). One commentator has noted that, "[a]s the first conference of this kind participated in by states from all parts of the world, it had to strive toward as broad an area of agreement as possible, acceptable to states old and new, whatever their political and economic systems." *Id.* at 16. The President of the United States, upon the advice and consent of the Senate, ratified the

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of the instant case, plaintiff was (and continues to be) an inmate in the custody of the Federal Bureau of Prisons as the result of a more recent conviction than the one involved in the instant case.

[7] The International Law Commission, which is "charged with the task of codifying and developing international law," was established by the General Assembly of the United Nations in 1947. *See generally* 1 *Oppenheim's International Law* 103-10 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996).

Convention in 1969. 21 U.S.T. at 77. As of 2006, 170 countries were party to the Convention. *Sanchez-Llamas*, 126 S. Ct. at 2674.

The Vienna Convention consists of a preamble and 79 articles. Article 36, which "concerns consular officers' access to their nationals detained by authorities in a foreign country," *id.* at 2675, states in full:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) *if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.* Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and

> correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

21 U.S.T. at 101-02 (emphasis added). Paragraph 2 of Article 36 is said to "provide[ ] guidance regarding how these requirements, and the other requirements of Article 36, are to be implemented." *Sanchez-Llamas*, 126 S. Ct. at 2675.

In addition to the Convention itself, the President, upon the consent of the Senate, ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes ("the Optional Protocol" or "Protocol"), Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820. The Protocol states that (1) the ICJ has "compulsory jurisdiction" over "[d]isputes arising out of the interpretation or application of the Convention" [8] and (2) accordingly, any State-party to

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[8] As we explained in *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250 n.24 (2d Cir. 2003):

the Protocol may bring such a dispute before the ICJ. *Id.* at 326. The United States withdrew from the Protocol in 2005.[9] *Sanchez-Llamas*, 126 S. Ct. at 2675.

The International Court of Justice ("ICJ") is a multinational body charged with discerning and applying international law. Under the Charter of the United Nations, "[a]ll Members of the United Nations [including the United States] are *ipso facto* parties to the Statute of the International Court of Justice." Charter of the United Nations, 59 Stat. 1033, 1051, T.S. No. 993 (1945), Art. 93 (effective Oct. 24, 1945).

The United States Senate consented to the Charter of the United Nations on July 28, 1945, 91 Cong. Rec. 8185, 8190 (1945), causing the United States to be a party to the Statute of the ICJ. The Senate famously conditioned its adoption of President Truman's Declaration that the United [S]tates would accede to the compulsory jurisdiction of the ICJ with the Connally Reservation, which permits the United States to opt out of the jurisdiction of the ICJ over a particular dispute if [it] determines that the dispute is domestic in nature and that its domestic jurisdiction applies. *See* Acceptance of Compulsory Jurisdiction of the International Court of Justice, 92 Cong. Rec. 10,694-97 (1946); Dep't State Bull., Sept. 1946, at 452-53.

[9] The international legal consequences of a State-party's unilateral withdrawal from a treaty that has no explicit withdrawal provision, such as the Optional Protocol, is a complicated and unsettled question. *See generally*, W. Michael Reisman & Mahnoush H. Arsanjani, *No Exit? A Preliminary Examination of the*

B. Facts and Procedural History of the Instant Case

The following facts are taken from the *pro se* complaint filed in the District Court by plaintiff-appellant Ricardo A. De Los Santos Mora ("plaintiff"). We accept these facts as true for the purposes of this appeal and draw all inferences in plaintiff's favor. *See, e.g., McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135, 138 (2d Cir. 2007).

Plaintiff is a currently incarcerated native and citizen of the Dominican Republic who entered the United States in 1991. In 1992, he was arrested in Queens, New York, and charged with attempted robbery in violation of New York State law. According to plaintiff's allegations, he did not speak English at the time of his arrest, and the arresting officers did not speak Spanish. He was interrogated without an interpreter present, although he told police in Spanish that he did not understand and wanted to speak with somebody in Spanish. After appearing before a judge, plaintiff was appointed counsel who did not speak Spanish. Plaintiff was then, according to his allegations, "coerced into taking a plea without the benefit of an interpreter." He was sentenced to six months' incarceration and five years' probation. The arresting officers and the prosecutor knew that plaintiff was a citizen of the Dominican Republic but never advised him that he

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Legal Consequences of the United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations, in Promoting Justice, Human Rights and Conflict Resolution Through International Law 897 (Marcelo G. Kohen ed., 2007). We need not address it here.

could request legal assistance from the Dominican consulate.

On December 5, 2005, plaintiff, who is represented by counsel on appeal, filed a *pro se* complaint under the Alien Tort Statute ("ATS").[10] Plaintiff's complaint alleges that defendants-appellees Queens County District Attorney and New York City Police Department (jointly, "defendants")[11] violated Article 36 of the Vienna Convention by failing to inform him that he could contact the Dominican consulate. It also claims that "[t]he outcome of Plaintiff['s] case would have been different if [he] would [have] known of his Vienna Convention rights," and that "serious error by the arresting officers and District Attorney caused [*sic*] [him] his freedom." As relief, plaintiff requested $1 million.[12] Shortly after filing his complaint, plaintiff requested permission to proceed *in forma pauperis*.

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[10] The ATS, sometimes referred to as the Alien Tort Claims Act, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

[11] Plaintiff referred to the New York City Police Department as "Flushing Queens Police Department" in his complaint.

[12] Plaintiff has filed similar complaints in other federal courts. In November 2005, he brought suit in the United States District Court for the Eastern District of Virginia, alleging violations of the Vienna Convention in connection with a 1997 conviction for drug trafficking. The District Court in that case concluded that a judgment in plaintiff's favor would necessarily imply the invalidity

of his conviction; it therefore dismissed the complaint pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) (holding that plaintiff's conviction must be declared invalid before plaintiff can proceed with a claim for damages based on the unlawful conviction). *See De Los Santos-Mora v. Bradenham*, 194 Fed. App'x 100, 101 (4th Cir. 2006). The Fourth Circuit vacated the District Court's judgment on the basis that plaintiff's suit was not "*Heck*-barred" because Article 36 "does not implicate any right to consular intervention or cessation of the criminal investigation and . . . violation of any rights under Article 36 would not trigger application of the exclusionary rule." *Id.* In January 2006, plaintiff brought suit in the United States District Court for the District of Delaware, alleging violations of the Vienna Convention in connection with a 1995 arrest and 1996 acquittal on drug trafficking charges. The District Court in that case declined to address whether Article 36 creates individual rights. Rather, it dismissed plaintiff's complaint for failure to state a claim upon which relief can be granted, observing that plaintiff could not show either "causation or damages" because (1) Article 36 does not guarantee any consular assistance, (2) plaintiff enjoyed the protections of the Due Process Clause, and (3) plaintiff was found "not guilty" by a jury. *See De Los Santos Mora v. Brady*, No. 06-46 -JJF, 2007 WL 981605, at *4 (D. Del. Mar. 30, 2007). Because we conclude that Article 36 does not confer upon plaintiff an individual right that he can enforce in the instant case, we take no view on whether his suit would be barred under *Heck* or whether he would be able to pursue claims for nominal damages in the event he cannot show a causal connection between his New York conviction and the alleged violations of Article 36.

In a memorandum and order entered on December 30, 2005, the District Court granted plaintiff's request to proceed *in forma pauperis*. However, the District Court *sua sponte* dismissed plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915A, concluding that "[t]he Vienna Convention was meant to protect the rights of states to care for their nationals traveling abroad, not to protect the rights of individuals." [13] Final judgment was also entered on December 30, 2005. Plaintiff timely appealed. On appeal, plaintiff, now represented by counsel, argues that Article 36 confers upon him individual rights that he may enforce, not only under the ATS, but also under 42 U.S.C. § 1983[14] and pursuant to an implied private right of action created by the Vienna Convention itself.

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[13] The District Court also commented that a violation of the Vienna Convention does not support dismissing an indictment or vacating a sentence, conclusions that we need not address in our consideration of the availability of a claim for money damages.

[14] In relevant part, 42 U.S.C. § 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

DISCUSSION

This appeal requires us to consider whether an alien may bring an action seeking damages for the alleged violation of Article 36(1)(b)(third)-that is, the obligation of States-parties to inform a detained alien of the availability of consular notification and access-directly under the Vienna Convention or pursuant to § 1983 or the ATS. We conclude that Article 36(1)(b)(third) does not provide for rights that can be vindicated through such litigation.

In the *Head Money Cases*, 112 U.S. 580, 5 S. Ct. 247 (1884), the Supreme Court summarized the basic relationship between treaties and individual rights. "A treaty," the Court explained, "is primarily a compact between independent nations." *Id.* at 598, 5 S. Ct. 247. As such, "[i]t depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.* Treaty violations, therefore, are "the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress." *Id.*"[W]ith all this the judicial courts have nothing to do and can give no redress." *Id.* However, "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal [*i.e.*, domestic] law, and which are capable of enforcement as between private parties in the courts of the country." *Id.* The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2,[15]

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[15] The Supremacy Clause provides in full:

"places such provisions . . . in the same category as other laws of [C]ongress." *Head Money Cases*, 112 U.S. at 598, 5 S. Ct. 247. Thus, "[a] treaty, then, is a law of the land as an act of [C]ongress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Id.* at 598-599, 5 S. Ct. 247. "And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would a statute." *Id.* at 599, 5 S. Ct. 247.

Whether a treaty creates a right in an individual litigant that can be enforced in domestic proceedings by that litigant is for the court to decide as a matter of treaty interpretation. *See Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) ("Whether a particular international agreement provides for private enforcement is a matter for judicial interpretation of the agreement."); Restatement (Third) of the Foreign Relations Law of the United States ("Restatement (Third)") § 907 cmt. a (1987) ("Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement.").[16] It

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> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[16] This inquiry is distinct from whether a treaty is "self-executing." Restatement (Third) § 111 cmt. h. "[N]ot

is our task in the instant case to determine whether the requirement that a detaining authority inform

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all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellín*, 552 U.S. at —, 128 S. Ct. at 1355. "Self-executing treaties do not require implementing legislation and become effective as domestic law immediately upon entry into force. Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted." *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 161 n.21 (2d Cir. 2007); *see also Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). In other words, "[t]he label 'self-executing' usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question." *United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (en banc) (Selya & Boudin, JJ., concurring) (citation omitted).

The Supreme Court has declined to resolve whether the Vienna Convention is self-executing. *See Medellín*, 552 U.S. at — n.4, 128 S. Ct. at 1357 n.4. The parties have not raised this question, and we need not decide it here.

an alien of the prospect of consular notification and access set forth in Article 36(1)(b)(third) of the Vienna Convention crosses the boundary between possible benefits to individuals secured by States and State officials and rights conferred directly upon individuals that are assertable, in a private action brought directly under the Convention itself or pursuant to § 1983 or the ATS, by the individuals themselves in our courts of law.

A. An Alien Cannot Vindicate in an Action for Damages a Violation of Article 36's Obligation to Inform Aliens of the Prospect of Consular Notification and Access.

1. Text and Context

"[T]he main task of any tribunal which is asked to apply or construe or interpret a treaty" is to "give[ ] effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*" Lord McNair, *The Law of Treaties* 365 (1961). It is thus a well-established principle that a court interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *United States v. Cuevas*, 496 F.3d 256, 263 (2d Cir. 2007) (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 534, 107 S. Ct. 2542 (1987)) (internal quotation marks omitted).

The text of Article 36 certainly requires that the authorities of a "receiving State" (that is, the detaining State) take certain actions with respect to the nationals of a "sending State" (that is, the detainee's home State). For example, paragraph 1(b)

of Article 36 provides that if a detained individual of foreign citizenship so requests, the detaining authorities must alert the individual's home consulate of the detention, *see* Art. 36(1)(b)(first); moreover, the authorities must inform the detained individual that he can contact his home consulate, *see* Art. 36(1)(b)(third). 21 U.S.T. at 101. And at least some of these requirements are explicitly referred to as "rights" of the individual foreign nationals. Paragraph 1(b) instructs the detaining authorities to inform the foreign national "without delay of his rights under this sub-paragraph," Art. 36(1)(b)(third), and paragraph 2 contains instructions for the implementation of the "rights referred to in paragraph 1." 21 U.S.T. at 101.

It is notable, however, that the critical requirement at issue in the instant case—a receiving State's obligation to inform a detained foreign national of his "rights" under paragraph 1(b)—is never itself expressly referred to as a "right." Moreover, the text of the Convention is entirely silent as to whether private individuals can seek redress for violations of this obligation—or any other obligation set forth in Article 36—in the domestic courts of States-parties. Of course, whether an individual right exists and how that right may be enforced by the individual are different questions. Nevertheless, we think that the lack of *any* mention in the text of Article 36(1) (b) as to whether or how detained foreign nationals might vindicate their asserted rights at least suggests that the drafters of the Convention did not intend to confer rights directly upon individuals. *Cf.* page 25-26 *post* (noting treaties that expressly provide for individual

judicial remedies).[17] The language of Article 36 is set forth in a document that "is *primarily* a compact between independent nations," although it "*may* also contain provisions which confer certain rights upon" individuals, *Head Money Cases*, 112 U.S. at 598, 5 S. Ct. 247 (emphasis added). But "[n]othing in [the treaty's] text explicitly provides for judicial enforcement of [its] consular access provisions at the behest of private litigants," *Li*, 206 F.3d at 66 (Selya & Boudin, JJ., concurring), or, for that matter, creates a right to be informed of the prospect of consular access and notification that can be privately vindicated directly under the Vienna Convention or pursuant to § 1983.

Moreover, we have observed that the vocabulary of "individual rights" may be used to refer to certain potential benefits provided by treaty that do not actually create rights enforceable by the individuals benefitted. *See United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975). As Judges Selya and Boudin explained in their concurring opinion in *Li*:

> Of course, there are references in the [Convention] to a "right" of access, but these

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[17] Indeed, the Vienna Convention elsewhere provides for remedies for violations of specific Articles, albeit remedies of States rather than of individuals. *See* Vienna Convention, Art. 23(2), 21 U.S.T. at 92 (providing a remedy to receiving States for a sending State's failure to recall a consular official deemed a *persona non grata*); Art. 31, 21 U.S.T. at 97 (providing for compensation to a State upon the expropriation of consular premises by the receiving State).

> references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligations *as between States.*

Li, 206 F.3d at 66 (Selya & Boudin, JJ., concurring) (emphasis in original). Indeed, even with respect to statutes, the Supreme Court has on several occasions rejected the argument that references to the "rights" of persons potentially benefitted by legislation (appearing both in text and legislative history) necessarily support the view that the legislation creates rights in individuals that can be enforced by those individuals through mechanisms such as a § 1983 action or an implied private right of action. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289 n.7, 122 S. Ct. 2268 (2002); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18-20, 101 S. Ct. 1531 (1981). Similarly, the isolated language of Article 36(1)(b) is at most ambiguous as to the existence of rights that can be privately vindicated in court in the manner sought by plaintiff. Thus, in accordance with the Fifth and Sixth Circuits, as well as Judges Selya and Boudin of the First Circuit, we conclude that the requirement that an alien be informed of consular notification and access in Article 36(1)(b)(third), even taken in conjunction with the several references to "rights," does not establish a right in the alien that can be vindicated in a damages action for failure to inform the alien of the obligation. *See Emuegbunam*, 268 F.3d at 391-94; *Jimenez-Nava*, 243 F.3d at 196-98; *Li*, 206 F.3d at 66-68 (Selya & Boudin, JJ., concurring).

Several additional textual and contextual considerations militate against construing Article 36's obligation to inform an alien of the prospect of consular notification and access as creating individual rights that, when violated, can be vindicated through private litigation brought directly under the Convention or pursuant to § 1983. For example, the first clause of paragraph 1 of Article 36 begins with the following statement of purpose: "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." 21 U.S.T. at 100. Plaintiff argues that individual enforcement of the Vienna Convention may aid sending States in the exercise of their consular functions. However, the introductory language of Article 36 emphasizes the exercise of these functions, rather than an individual's ability to benefit from these functions-giving rise to ambiguity as to whether the provisions that follow create entirely independent individual rights that may be vindicated by lawsuits in our courts.

The Preamble to the Convention also favors defendants' position.[18] It bears underscoring that a

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[18] The Preamble to the Vienna Convention on Consular Relations reads in full:

> *The States Parties to the present Convention*,
>
> *Recalling* that consular relations have been established between peoples since ancient times,
>
> *Having in mind* the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

preamble is not without meaning under international law. It provides valuable context for understanding the terms of a treaty. *See* Vienna Convention on the Law of Treaties, art. 31(2), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340 (providing that "[t]he context for . . . purpose[s] of . . . interpret[ing] . . . a treaty shall comprise . . . the text, *including its preamble* and annexes," as well as other related agreements (emphasis added)).[19]

> *Considering* that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
>
> *Believing* that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
>
> *Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,
>
> *Affirming* that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,
>
> *Have agreed* as follows. . . .

21 U.S.T. at 79 (footnotes omitted).

[19] Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it "as an authoritative guide to the customary international law of treaties," insofar as it reflects actual

The parties focus on the language in paragraph five of the Preamble stating that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Defendants and *amicus* the United States argue that this language is evidence that the Convention is not meant to confer rights on individuals. Defs.' Br. 7; *Amicus's* Br. 7-8. Plaintiff, pointing out that the preceding clause in paragraph four of the Preamble specifies that the "privileges and immunities" mentioned are "consular," argues that paragraph 5's language "has no bearing on the existence of rights assertedly granted to *private* individuals by specific articles of the treaties, but rather refers to benefits attaching to consular or diplomatic officers as a result of their status as officials representatives of a foreign State." Pl.'s Supp. Reply Br. 2. In other words, according to plaintiff, the Preamble "merely set[s] forth the long-standing principle that the intent of granting privileges and immunities *to oficial representatives of foreign States* is not to benefit those individuals personally, but rather to further the amicable relations between the receiving State and the sending State . . . ." *Id.* at 3 (emphasis added).

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state practices. *See Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79 & n.8 (2d Cir. 2005). The Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice. *Id.* at 79 n.8.

Even if the Preamble cannot be read as explicitly or categorically rejecting the creation of rights in private individuals, it certainly reflects the broader principle that the Convention is concerned primarily, if not exclusively, with establishing relationships and rights as between States and State officials.[20] By referring only to "consular relations, privileges and immunities," the Preamble suggests that any relations, privileges, or immunities the Convention creates are strictly those of consular officials. [21]

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[20] Indeed, this seems to have been the understanding of the United States at the time that the Vienna Convention was ratified. The report prepared by the Senate Committee on Foreign Relations (the "Committee") recommending that the Senate give its advice and consent to ratification of the Convention and Protocol understood Articles 28 to 57 to be about "[c]onsular facilities, privileges and immunities of consular officers and other members of a consular post." S. Exec. Rep. No. 91-9 at 2 (1969). This understanding was based in part on testimony from the Deputy Legal Adviser for Administration that "the particular virtue of this Convention lies in its establishment of a basic standard of treatment for *consular posts and their personnel* throughout the world. . . ." *Id.* at 8 (emphasis added); *see also id.* at 6 ("[T]he Convention . . . goes very far toward clarifying the obligations of states concerning the treatment to be accorded foreign consular posts and their personnel. Because of its definite rules and procedures, the Convention should reduce the possibility of misunderstanding between governments in this area of their relations.").

[21] To the extent plaintiff's argument suggests that, as a general matter, the Convention treats "rights" differently from "privileges and immunities," we disagree.

Moreover, the Preamble declares that the overarching aim of the Convention is to "contribute to the development of friendly relations *among nations.*" 21 U.S.T at 79 (emphasis added). The motivating principles of the Convention as stated in the Preamble are clearly principles governing the relations of States *inter se*-concern for the "sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations." *Id.* These passages suggest that the rights created by the Convention similarly belong to, and should generally be enforced by, the States-parties to the Convention and their official representatives.

The Optional Protocol likewise reinforces the view that Article 36(1)(b)(third) does not create rights in an individual that can be vindicated through an action for damages. Although expressly designed to implement the terms of the Convention, it makes no mention of private actions by detained individuals. Rather, Article I of the Protocol provides

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If the consular "privileges and immunities" referred to in the Preamble are distinct from any consular "rights" referred to later in the Convention, then those consular "rights" would not be subject to the preambular limitation on providing benefits to individuals, rather than to consular officers in their official capacity. Plaintiff's view has been explicitly rejected by the Supreme Court. *See Breard*, 523 U.S. at 378, 118 S. Ct. 1352 ("Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual.").

that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the [ICJ] by an application made by any [State-]party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326.

The lack of individual rights that can be vindicated through a private action for damages does not deprive Article 36 of force for at least four reasons. First, states-parties can safeguard the rights in the Convention (and protect their nationals) through "negotiations and reclamations." *See Head Money Cases*, 112 U.S. at 598, 5 S. Ct. 247. Second, the reciprocal nature of the Vienna Convention provides receiving states with a natural incentive to comply with its terms.[22] For instance,

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[22] The United States, in a brief signed by the Department of State and the Department of Justice, informs us that federal authorities in the United States have undertaken extensive efforts to raise awareness of, and secure adherence to, the terms of the Convention at all governmental levels, notwithstanding the lack of any successful civil suits by individuals seeking to enforce Article 36. We note several examples of these efforts here: Beginning in 1970, the State Department sent letters to the governors of all 50 states, "advising them that the Convention had entered into force and reviewing its requirements." *Amicus's* May 11, 2007 Supp. Letter Br. 6. In addition, "State Department officials attended conferences of law enforcement officials, . . . published articles in law enforcement magazines[,] . . . and conducted periodic mass mailing to major U.S. cities" in an effort to publicize the requirements of Article 36. *Id.* Since 1998, State Department personnel have conducted

approximately 454 training events on Article 36 throughout the United States and its territories. *Id.* at 3 (citing http://travel.state.gov/law/consular/consular_3139 .html). In 1998, the State Department published and widely circulated a manual entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them. Id.* at 4. The Department has also made efforts to incorporate the requirements of Article 36 into the training curricula and accreditation standards of law enforcement agencies. *Id.* at 4. Furthermore, in its representations to the ICJ, the United States stated that the federal judiciary has been "enlisted" directly to help with Treaty compliance, and further that the "United States affirmatively encourages judicial authorities to ensure that consular notification requirements have been complied with, and some states have placed the obligation of providing or confirming consular information on their magistrates." Declaration of Ambassador Maura A. Harty, Annex 4 to Counter-Memorial of the United States at A11, ¶ 28, *Case Concerning Avena and other Mexican Nationals* (*Mex.v.U.S.*), 2004 I.C.J. No. 128 (Oct. 25, 2003); Counter-Memorial of the United States at 110, *Case Concerning Avena and other Mexican Nationals* (*Mex.v.U.S.*), 2004 I.C.J. No. 128 (Nov. 3, 2003). In addition, regulations govern compliance with Article 36 on the part of federal law enforcement officials. *Id.* at 9 (citing 28 C.F.R. § 50.5 (Department of Justice); 8 C.F.R. § 236.1(e) (Department of Homeland Security); and 28 C.F.R. § 540.45(b) (Bureau of Prisons)). Some states too have passed laws enacting the substance of Article 36. *See, e.g.*, Cal.Penal Code § 834c(a) (1) ("In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she

the United States, in an action brought by the federal government, can sue state and local governments to ensure compliance. *See Amicus's*

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has a right to communicate with an official from the consulate of his or her country . . .").

The United States also informs us that many of its compliance efforts have been directed toward New York City. The State Department has distributed hundreds of pocket reference cards and training videos to state and local law enforcement entities in the City, and has provided training sessions and briefings for law enforcement officials on a number of occasions. *Id.* at 7-8.

With respect to the policies and practices of New York City law enforcement authorities themselves, defendants and the United States have informed us that the New York City Police Department's Patrol Guide sets forth procedure No. 208-56, which governs the processing of the arrests of foreign nationals and requires that certain consulates be notified if one of their nationals is arrested and that nationals from other countries be informed that they may contact their consulates. The New York City Department of Corrections maintains a similar procedure for foreign nationals in custody. These basic requirements are not significantly different from those in place when defendant was arrested in 1992. Defs.' Apr. 18, 2007 Letter 2; *Amicus's* May 11, 2007 Supp. Letter Br. 8. The NYPD's Police Student's Guide explains these requirements, and the City holds seminars for law enforcement officials on the Convention's consular notification provisions. *Amicus's* May 11, 2007 Supp. Letter Br. 8 (citing http://www.nyc.gov/html/unccp/html/consular/special_ events.shtml).

May 11, 2007 Supp. Letter Br. at 10 ("[T]he federal government is empowered to require that state or local law enforcement officials who detain foreign nationals do so in accordance with the substantive restrictions set out in the Convention."); *see also* Brief for United States, as *Amicus Curiae* Supporting Respondents at 15, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669 (2006), 2006 WL 271823, at *15 ("Under longstanding principles, the United States could bring an action in court to enforce compliance with a treaty obligation.") (citing *Sanitary Dist. v. United States*, 266 U.S. 405, 425-26, 45 S. Ct. 176 (1925) (Holmes, J.)). Third, the lack of any privately enforceable right to damages for a violation of Article 36(1)(b)(third) may not foreclose the possibility that a domestic court, having established that an arrested alien is a foreign national, might inquire whether he has been informed that he may contact his consulate and fulfill the obligation to inform him. Fourth, a detained alien may be able to petition officials of a detaining authority, including where appropriate the courts, to comply with the obligations set forth in Article 36. These mechanisms might not always result in outcomes fully satisfactory to the offended State, but failure to secure optimal compliance or relief does not deprive a treaty provision of meaning any more than, for example, a judgment for nominal damages makes a statute meaningless.

We also reject the argument that plaintiff's inability to recover damages for the alleged violation of Article 36(1)(b)(third) is incompatible with paragraph 2 of Article 36, which requires that the laws and regulations of States-parties "enable full

effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U.S.T. at 102. In *Sanchez-Llamas*, the Supreme Court, assuming *arguendo* the existence of individual rights under Article 36, considered the claim that applying procedural default rules to such rights would deny Article 36 "full effect." [23] The Court explained its rejection of this claim as follows:

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[23] In *Sanchez-Llamas*, the Court "assum[ed], without deciding," that Article 36 created a judicially-enforceable right to consular notification and access but concluded that an exclusionary remedy was inappropriate for violation of rights conferred by the Vienna Convention. 548 U.S. at —, 126 S. Ct. at 2677-78; *see also Medellín*, 552 U.S. at — n.4, 128 S. Ct. at 1357 n.4 (same). This approach-to "assume without deciding" that the relevant provision of Article 36 creates privately enforceable individual rights-arguably could apply to plaintiff's claim for damages pursuant to an implied private right of action under the treaty. Such an approach, however, is inappropriate where the plaintiff claims a (damages remedy pursuant to § 1983 and would rest on a fundamental misunderstanding of the relationship between treaty law and § 1983. *See also Jogi*, 480 F.3d at 831-32 noting the distinction "between a private right, on the one hand, and various remedial measures that affect criminal prosecutions, on the other").

Because we hold that Article 36(1)(b)(third) does not create rights that can be vindicated in a damages action brought directly under the Convention or pursuant to § 1983, we disagree that plaintiff can state a claim for a private right of action created by the Convention. Nonetheless, we note that assuming *arguendo* that plaintiff has an individual right under the Convention, his claim for damages pursuant to § 1983 would likely be

Sanchez-Llamas argues that the language of the Convention implicitly requires a judicial remedy because it states that the laws and regulations governing the exercise of Article 36 rights "must enable *full effect* to be given to the purposes for which the rights . . . are intended," Art. 36(2), 21 U.S.T., at 101 (emphasis added). In his view, although "full

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actionable. *See Gonzaga*, 536 U.S. at 284, 122 S. Ct. 2268 ("[B]ecause § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes[,] [o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."(citation omitted)). Section 1983 would likely provide a cause of action for damages in the case of a treaty violation in the same manner that § 1983 provides a cause of action for remedying a statutory violation. *See, e.g.*, *Cornejo*, 504 F.3d at 858 ("[A]n unambiguously conferred right phrased in terms of the person benefitted is essential before a statute-and by extension, a treaty having the force of federal law-may support a cause of action under § 1983.") (internal quotation marks omitted).

Accordingly, a conclusion that *the treaty* does not provide a right to damages ignores the fact that it is § 1983 that allows for damages and not the treaty. Notably, in *Sanchez-Llamas*, the remedy sought was based on the treaty itself, such as suppression of evidence or dismissal of an indictment. Accordingly, the Court found that the treaty did not grant such a remedy and avoided the question of whether the treaty created an individual right. 548 U.S. at —, 126 S. Ct. at 2677-78.

> effect" may not automatically require an exclusionary rule, it does require an appropriate judicial remedy of *some* kind. There is reason to doubt this interpretation. In particular, there is little indication that other parties to the Convention have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions. . . . Of course, diplomatic avenues-the primary means of enforcing the Convention-also remain open.

Sanchez-Llamas, 126 S. Ct. at 2680-82 (emphasis in original). For similar reasons, we do not regard the Convention's "full effect" provision as *requiring* a damages claim for a failure to inform an alien of the consular access and notification requirements. In addition to the remedies normally available to States-parties to a treaty, courts may themselves take actions to comply with the Convention that, in effect, correct violations of the treaty by law enforcement authorities. A court's compliance with Article 36, perhaps in response to a request by our national government for treaty compliance addressed to the thousands of law enforcement authorities in our federal system, *see* note 22 *ante*, is not the same as individual enforcement of alleged Article 36 rights in a private civil lawsuit for damages; this independent responsibility or ability on the part of a court to abide by the Convention has nothing to do with the existence *vel non* of rights enforceable in a private action by an individual.[24] We

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[24] Our holding does not render Article 36's guarantees empty nor does it conflict with *Sanchez-Llamas*, 126 S. Ct. at 2682 ("If [a foreign national] raises an Article 36 violation at trial, a court can make appropriate

reject any suggestion by plaintiff that Article 36 is rendered meaningless in the absence of a cause of action for damages by individual foreign nationals to vindicate an alleged violation of its notification provisions.

2. The Presumption Against Conferral of Individual Rights by International Treaties Requires a Clear Statement of the Treaty Drafters' Intent

"Even when treaties are self-executing . . . the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellín*, 552 U.S. at — n.3, 128 S. Ct. at 1357 n.3 (citation and quotation marks omitted). We have recognized that international treaties establish

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accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance."). The court would not actually be remedying a treaty violation or allowing enforcement of an individual right, as it would if it applied the exclusionary rule, or dismissed an indictment, or allowed a civil suit to proceed; rather, it would simply be complying with the terms of the treaty. Thus, even in the absence of individual rights enforceable by an alien in a civil proceeding, a court might-possibly in response to requests for cooperation by our national government, which itself acts under a treaty obligation assumed by that government in its international relations-inquire as to whether a defendant knows that he may contact his consulate; it might even order that the prosecuting authority allow a foreign national to contact his consulate.

rights and obligations between States-parties-and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty's existence. This is so because a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement. *Medellín*, 552 U.S. at —, 128 S. Ct. at 1357. As the Supreme Court explained in the *Head Money Cases*,

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.

112 U.S. at 598, 5 S. Ct. 247. The mechanisms for establishing and enforcing international treaties-namely, the nation's powers over foreign affairs-have been delegated by the Constitution to the Executive and Legislative branches of government. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309 (1918) ("[T]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative-'the political'-departments."). Accordingly, a due respect for the Constitution's separation of powers, and a recognition of our own weak tools in this area, require the courts to refrain from venturing heedlessly into the realm of foreign affairs. *See Head Money Cases*, 112 U.S. at 598, 5 S. Ct. 247 ("It is obvious that with all this [*i.e.*, treaty negotiation and

enforcement] the judicial courts have nothing to do and can give no redress."). Indeed, the Supreme Court has specifically instructed courts to exercise "great caution" when considering private remedies for international law violations because of the risk of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28, 124 S. Ct. 2739 (2004). For these reasons, when interpreting treaties, we generally look for a clear statement of the intent of treaty drafters.

Our cautious approach to recognizing private rights within treaty provisions obtains even when international treaties appear to confer benefits on individuals. Over a quarter of a century ago, we explained that "even where a treaty provides certain benefits for nationals of a particular state-such as fishing rights-it is traditionally held that 'any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.'" *Gengler*, 510 F.2d at 67 (quoting Restatement (Second) of the Foreign Relations Law of the United States ("Restatement (Second)") § 115 cmt. e (1965)); *see also* Restatement (Third) § 907 cmt. a ("International agreements, *even those directly benefiting private persons*, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies."(emphasis added)).

The presumption that "treaties do not create privately enforceable rights in the absence of express language to the contrary" is reflected in the case law

of our own Circuit and that of our sister circuits. *See Medellín*, 552 U.S. at — n.3, 128 S. Ct. at 1357 n.3.[25]

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[25] As the Supreme Court has noted, other courts of appeals have recognized this presumption that treaties generally "do not create privately enforceable rights in the absence of express language to the contrary." *Medellín*, 552 U.S. at — n.3, 128 S. Ct. at 1357 n.3. At least nine of the other courts of appeals have applied such a presumption. *See United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) ("[T]reaties do not generally create rights that are privately enforceable in the federal courts."); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979) ("Like private rights under law, a treaty may confer rights capable of enforcement, but this is not the general rule."(citations omitted)); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001) ("[Treaties] do not generally create rights that are enforceable in the courts."); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) ("As a general rule . . . international treaties do not create rights that are privately enforceable in the federal courts."); *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("Although international treaties as a rule do not create individual rights, *Sosa* recognizes that international law in general, and thus treaties in particular, occasionally do so."(citation omitted)); *Cornejo v. County of San Diego*, 504 F.3d 853, 859 (9th Cir. 2007) ("Whether or not aptly characterized as a 'presumption,' the general rule is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies." (international quotation marks and citations omitted)); *Canadian Transport Co. v. United States*, 663

Our precedents recognize a presumption against inferring individual rights from treaties. *See, e.g.*, *United States v. Rommy*, 506 F.3d 108, 129-30 (2d Cir. 2007) (applying presumption to a bilateral mutual legal assistance treaty between the United States and the Netherlands); *United States v. Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985) (applying presumption to United States-Switzerland bilateral mutual legal assistance treaty); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir. 1976) (applying presumption to Hague Convention, the Kellogg-Briand Pact, the Versailles Treaty, and the Four Power Occupation Agreement); *Gengler*, 510 F.2d at 67 (2d Cir. 1975) (applying presumption to United Nations Charter and the Charter of the Organization of American States).

If contracting States-parties wish to impose upon themselves legal obligations that extend not only to

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F.2d 1081, 1092 (D.C.Cir. 1980) ("[A] treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom."); *see also Dry v. United States*, 235 F.3d 1249, 1256 (10th Cir. 2000) ("It is well-settled that [t]he very great majority of Indian treaties create tribal, not individual, rights."(internal quotation marks and citations omitted)); *Ligon v. Johnston*, 164 F. 670, 672 (8th Cir. 1908) ("Until specific, private, individual rights attach pursuant to law, the enforcement of such trusts [as created by treaty] must be at the bar of public conscience. They are not justiciable in the courts."). It should be noted that courts of appeals have occasionally conflated the question of whether a treaty is self-executing with whether the same treaty creates individual rights. *See, e.g.*, *Mannington Mills*, 595 F.2d at 1298.

each other, but to all individual foreign nationals, we would ordinarily expect expression of these obligations to be unambiguous. Whether we call this expectation a "presumption," or refer to it as some other rule of construction,[26] or simply treat it as a general guide to treaty interpretation, the result is the same. *See, e.g.*, *Medellín*, 552 U.S. at —, 128 S. Ct. at 1357 n.3 (adopting a clear-statement rule for determining when treaties are self-executing); *Breard*, 523 U.S. at 375, 118 S. Ct. 1352 (1998) ("[I]t has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135, 109 S. Ct. 1676 (1989) ("We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and

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[26] *Amicus* United States argues that the inquiry as to whether a treaty, as federal law, creates private rights should be guided by principles, such as the *Gonzaga* "clear-statement rule," governing whether a statute creates individual rights. *See, e.g.*, *Gonzaga University v. Doe*, 536 U.S. 273, 290, 122 S. Ct. 2268 (2002) ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms-no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."). We note that the two other courts of appeals to address the question of whether a violation of Article 36(1)(b)(third) is remediable in private action pursuant to § 1983 have applied the *Gonzaga* clear-statement rule in this context. *Cornejo*, 504 F.3d at 858-60 (concluding that presumption was not overcome); *Jogi*, 480 F.3d at 827-28 (finding the presumption overcome).

having found that, our duty is to follow it as far as it goes, and to stop where that stops-whatever may be the imperfections or difficulties which it leaves behind.").[27]

We do not, of course, require "robotic incantations" or "talismanic invocations" by treaty drafters in order to create individual rights, any more than we do of Congress, district judges, or administrative agencies in a variety of spheres. *See, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 336 n.17 (2d Cir. 2006) (reviewing an immigration judge's credibility finding); *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006) (reviewing a district court's consideration of the sentencing set out in 18 U.S.C. § 3553(a)); *Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 900 (2d Cir. 1981) (considering whether Congress created a statutory private right of action). Indeed, the Supreme Court, on several occasions, has permitted foreign nationals to enforce provisions of treaties that did not explicitly provide for judicial enforcement of their guarantees. *Cf. Kolovrat v. Oregon*, 366 U.S. 187, 190-91 & n.6, 81 S. Ct. 922 (1961) (allowing foreign nationals to challenge a state law limiting their inheritance rights under a

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[27] This presumption comports with the approach offered by Justice Breyer in his dissent in *Medellín:* where a treaty creates "specific, detailed individual legal rights . . . that judges can readily enforce," it is likely directly enforceable, but where enforcement of a treaty would require the creation of a new cause of action, "it is not likely that the provision contemplates direct judicial enforcement." 552 U.S. at —, 128 S. Ct. at 1382 (Breyer, J., dissenting).

treaty providing that "[i]n all that concerns the right of acquiring, possessing or disposing of every kind of property . . . citizens of [each country who reside in the other] shall enjoy the rights which the respective laws grant . . . in each of these states to the subjects of the most favored nation"); *United States v. Rauscher*, 119 U.S. 407, 410-11, 7 S. Ct. 234 (1886) (allowing a criminal defendant to raise in his defense certain alleged violations of an extradition treaty). However, these cases represent circumstances in which the general presumption was overcome because it was far clearer that the intent of the treaty drafters was to confer rights that could be vindicated in the manner sought by the affected individuals. *See also Jimenez-Nava*, 243 F.3d at 197.

In sum, there are a number of ways in which the drafters of the Vienna Convention, had they intended to provide for an individual right to be informed about consular access and notification that is enforceable through a damages action, could have signaled their intentions to do so. *Cf.* Treaty of Friendship, Commerce and Consular Rights, U.S.-Ger., art. I, Dec. 8, 1923, 44 Stat. 2132, 2133 (expressly providing that "[t]he nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights"); Treaty of Commerce and Navigation, U.S.-Japan, art. VII, Feb. 21, 1911, 37 Stat. 1504, 1506 (expressly authorizing companies in the contracting parties' territory "to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other [p]arty"); *see also Clark v. Allen*, 331 U.S. 503, 67 S.

Ct. 1431 (1947) (entertaining an individual suit brought under the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany); *Asakura v. City of Seattle*, 265 U.S. 332, 44 S. Ct. 515 (1924) (allowing a foreign national to challenge a city ordinance on the basis that it violated the US-Japan Treaty of Commerce and Navigation). That they chose not to signal any such intent counsels against our recognizing an individual right that can be vindicated here in a damages action.

3. The Views of the United States Are Entitled to Substantial Deference

The views of *amicus* the United States constitute another "very powerful reason" for concluding that private individuals do not have rights that can be vindicated in a damages suit for failure to be informed about consular notification and access. *Li*, 206 F.3d at 67 (Selya & Boudin, JJ., concurring). We place "great weight" on the interpretation of a treaty by the Executive of our federal government. *See Medellín*, 552 U.S. at —, 128 S. Ct. at 1349; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S. Ct. 2374 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). In the instant case, two federal agencies-the Department of State and the Department of Justice-have jointly submitted an *amicus* brief to our Court on behalf of the United States in support of defendants' position regarding the existence *vel non* of individual rights that can be vindicated privately in courts. *Cf. id.* at 184-85 & n.10, 102 S. Ct. 2374

(stating that the interpretation of a treaty set forth in an *amicus* brief by the Department of State was entitled to "great weight"). Plaintiff argues that the deference we owe the position of the United States is diminished here because the United States has previously argued, before an international tribunal, that Article 36 creates judicially enforceable individual rights. In particular, plaintiff directs us to the official pleading of the United States in *Case Concerning U.S. Diplomatic & Consular Staff in Tehran* (*U.S. v. Iran*), 1980 I.C.J. 3 (May 24). We disagree that this pleading reflects an inconsistency from the view to which it has "unfailingly adhered" that the Vienna Convention "does not create domestically enforceable federal law" of the sort that would support plaintiff claims, *Medellín*, 552 U.S. at —, 128 S. Ct. at 1361; nor does this persuade us to give less than "great weight" to the views expressed in the *amicus* brief.

Plaintiff emphasizes that in its pleading to the ICJ in the 1980 litigation involving Iran's taking of American diplomatic and consular staff as hostages, the United States argued that "Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." Memorial of the Government of the United States of America, *Case Concerning U.S. Diplomatic & Consular Staff in Tehran* (*U.S. v. Iran*), 1982 I.C.J. Pleadings 121, 174 (Jan. 12, 1980). This statement, however, must be understood in context. The opening sentence of the section containing the statement reads as follows:

> Pursuant to Article 36 of the Vienna Convention on Consular Relations, the Government of Iran is *under an international legal obligation to the United States to ensure* that United States consular officers shall be free to communicate with nationals of the sending State and to have access to them, *that United States nationals in Iran have the same freedom with respect to communication with an access to consular oficers of the sending State*, and that United States consular officers have the right to visit United States nationals who are in prison, custody, or detention.

Id. at 173 (emphasis added) (internal quotation marks omitted). This sentence makes clear that whatever derivative protections Article 36 might provide to individuals-even if these protections may be referred to as "rights"-the legal obligations arising thereunder are owed to the United States, not to the individuals themselves. *Cf. Gonzaga*, 536 U.S. at 289 n.7, 122 S. Ct. 2268 (rejecting the argument that "any reference to 'rights,' even as a shorthand means of describing standards and procedures imposed . . . should give rise to a statute's enforceability under § 1983"). Thus, it is manifestly the case that, in its pleading to the ICJ, the United States was *not* suggesting that the American hostages taken by Iran ought to have access to the courts of Iran in order to vindicate their individual rights under the Convention. Accordingly, we do not find the pleading to be inconsistent with the current views of the

United States,[28] to which we must continue to accord great weight.[29]

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[28] As the First Circuit's majority opinion in *Li* reveals, the views of the United States to which we defer in the instant case are by no means confined to the administration of President George W. Bush. Writing in February 2000, and discussing the position of the State Department under President William J. Clinton, the First Circuit stated that "[i]n the State Department's view, the [Convention] [does] not create individual rights at all...." *Li*, 206 F.3d at 63. Quoting from a series of answers provided by the State Department in response to questions by the First Circuit, the *Li* Court explained:

> [T]he State Department has concluded that "[t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations. . . . They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned."

Id. (omission and second and third alterations in original). Quoting further from the State Department answers, the First Circuit related that it was the State Department's position that "[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* (second and third alterations in original) (internal quotation marks omitted).

[29] In any event, isolated past inconsistencies do not diminish the deference that courts owe clearly espoused views of the Executive in the realm of treaty

4. The Views of the ICJ Do Not Persuade Us that Article 36 Confers an Individual Right that Can Be Vindicated in a Damages Action, Either Directly Under the Convention or Pursuant to § 1983.

Plaintiff draws to our attention two opinions of the ICJ that, he claims, addressed the existence of individual rights under Article 36 of the Vienna Convention that can be privately vindicated in courts. *See Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 21); *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27). In those cases, the ICJ made certain comments regarding the "rights" of individuals under Article 36 while considering whether "the Vienna Convention . . . preclude[s] the application of procedural default rules to Article 36 claims" raised in American *habeas corpus* proceedings. *Sanchez-*

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interpretation. *See, e.g.*, *Sumitomo Shoji Am., Inc.*, 457 U.S. at 184 n.10, 102 S. Ct. 2374 (explaining that the State Department's current interpretation of a treaty was still entitled to "great weight" notwithstanding a prior letter by a State Department Deputy Legal Adviser that took a contrary view); *cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207 (1987) (noting, when declining to give deference to an agency's interpretation of a statute, the agency's "long pattern of erratic treatment of the issue"). And even where an extensive series of prior positions might justify decreased deference, at a minimum those positions, when compared with the current position, must reflect plain inconsistency on the part of the Government. *Cf. id.*(describing "three different ways" in which an agency interpreted the statute at issue). We find no such inconsistency here.

Llamas, 126 S. Ct. at 2683. In contrast to the "great weight" we must provide the views of our Executive, the Supreme Court has instructed that we "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Breard*, 523 U.S. at 375, 118 S. Ct. 1352. We are not bound either to give that interpretation any particular weight when considering the text and context of a treaty, or to treat it as having any dispositive effect in the event of ambiguity. Accordingly, the "respectful consideration" owed to the interpretation of an international court is similar to our treatment of, *inter alia*, agency opinion letters and enforcement manuals under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944). *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000). That is, the interpretation of the international court is "entitled to respect . . . but only to the extent that [it has] the power to persuade." *Id.* (citations and internal quotation marks omitted). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161.[30]

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[30] The treatment of ICJ decisions described above is consistent with the treatment of ICJ judgments by the Supreme Court, *see Medellín*, 552 U.S. at —, 128 S. Ct. at 1359 ("ICJ judgments were not meant to be enforceable in domestic courts."), as well as the role of ICJ judgments mandated by Article 59 of the Statute of the International

We do not find the views of the ICJ expressed in *Avena* and *LaGrand* to be persuasive in the instant case. In *Avena*, the ICJ merely asserted that "the individual rights . . . under paragraph 1(b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States." *Avena*, 2004 I.C.J. at 35. No further rationale was given for regarding Article 36 as conferring rights upon private individuals that they can enforce in domestic courts. The ICJ then observed that "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court *by the national State of the detained person.*" *Id.* at 36 (alterations and omission in original) (emphasis added) (quoting *LaGrand*, 2001 IC.J. at 494) (internal quotation marks omitted). This conclusion-that Article 36 creates "individual rights" that can be asserted *by a sending State in the ICJ*-is not inconsistent with the view that Article 36 creates potential benefits for individuals but that an individual does not have a right that can be vindicated in a damages action for such a violation. And even if the import of this statement were that Article 36 confers enforceable rights directly upon individuals, we do not think that the ICJ's brief analysis in *LaGrand* leading to such a determination casts doubt upon our conclusions above. After listing the basic requirements of Article

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Court of Justice, which provides that a "decision of the [ICJ] has no binding force except between the parties and in respect of that particular case," June 26, 1945, 59 Stat. 1051, 1062, T.S. No. 993. *See generally Flores*, 414 F.3d at 250-52 & n.25.

36, the ICJ noted that Article 36 uses the term "rights" and allows a detained foreign national to refuse assistance from the sending State. *See LaGrand*, 2001 I.C.J. at 494. The ICJ then stated that "[t]he clarity of these provisions, viewed in their context, admits of no doubt." *Id.* Yet a proclamation of certainty is not a substitute for persuasiveness. We do not believe that the relevant provision at issue here indicates an intention, much less a clear one, to confer rights directly upon individuals that can be vindicated in a damages action for failure to inform them of the obligation of consular notification and access.

5. The Convention's *Travaux Préparatoires* Do Not Require a Different Result

The Supreme Court has observed that it has "traditionally considered as [an] aid[ ] to [a treaty's] interpretation the [treaty's] negotiating and drafting history (*travaux préparatoires*)." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S. Ct. 629 (1996); *see also Société Nationale Industrielle Aérospatiale*, 482 U.S. at 534, 107 S. Ct. 2542 ("The treaty's history, the negotiations, and the practical construction adopted by the parties *may* [in addition to text and context] be relevant." (emphasis added) (internal quotation marks omitted)). The terms in which the Supreme Court has described the interpretive effect of the negotiating and drafting history of a treaty, the *travaux préparatoires*, suggest a usefulness that is conditional and secondary to the text and context of the treaty. As Article 32 of the Vienna Convention on the Law of Treaties, *see* note 19 *ante* and accompanying text, explains further, recourse to the *travaux* "may be

had" only to (1) "confirm the meaning resulting from" the consideration of text and context or (2) "determine the meaning when the interpretation according to [text and context] (a) [l]eaves the meaning ambiguous or obscure[ ] or (b) [l]eads to a result which is manifestly absurd or unreasonable." 1155 U.N.T.S. at 340.

Whether the *travaux* support plaintiff's stance is by no means clear. Plaintiff directs us to several discussions of "individual rights" during debates over proposed amendments to the Convention. *See, e.g.*, 1 *Official Records*, United Nations Conference on Consular Relations 332 (1963) (statement of the Spanish delegate, asserting that "[t]he right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own countries . . . was one of the most sacred rights of foreign residents in a country"). Yet, as is the case with references to "rights" in the legislative history of statutes, *see Pennhurst*, 451 U.S. at 18-20, 101 S. Ct. 1531, such terminology does not usefully distinguish between (1) legal obligations owed directly to individuals and enforceable by them under municipal (*i.e.*, domestic) law, and (2) legal obligations that might inhere to the benefit of individuals but are owed to a representative entity. The plaintiff has also not directed us to any passage in which the Conference considered whether these "rights" could be vindicated in an action for damages, nor have we located such a passage. In any event, scattered examples drawn from the *travaux* to support plaintiff's position would not defeat the deference ("great weight") we owe to the clear and consistent views of the United States.

B. Plaintiff's Claims Cannot Support a Cause of Action Pursuant to the ATS

Apart from his claims based on an implied right of action under the Vienna Convention and § 1983, plaintiff claims that this alleged violation of Article 36(1)(b)(third) gives rise to a claim pursuant to the ATS for a violation of customary international law. The novel tort proposed, a form of unlawful detention, does not meet the Supreme Court's requirements for recognition of a customary international law tort.[31] We conclude that plaintiff

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[31] A violation of Article 36(1)(b)(third) by itself would not meet the specificity requirement for recognition of an ATS cause of action. In *Sosa*, the Court concluded that a general prohibition of "arbitrary detention," even where such a norm was prescribed in an international agreement, was too broad to achieve the status of a binding customary norm actionable under the ATS. 542 U.S. at 736, 124 S. Ct. 2739;*id.* at 738, 124 S. Ct. 2739 ("Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise."). Rather, defining the plaintiff's claim at the requisite level of specificity, the Court concluded that plaintiff's tort claim on the basis of "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.; see also Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104; 119 (2d Cir. 2008) (concluding that plaintiffs had not provided

has not shown that his detention without being informed of the availability of consular notification and access amounts to a tort in violation of customary international law cognizable under the ATS, 28 U.S.C. § 1350.

In *Sosa v. Alvarez-Machain*, the Supreme Court acknowledged that the ATS is a jurisdictional statute but that it also grants courts the power recognize "private causes of action for certain torts in violation of the law of nations,"542 U.S. 692, 724, 124 S. Ct. 2739 (2004). The Court cautioned against recognition of actionable international norms and observed that only a "modest number" of customary international law torts are cognizable under the ATS. *Id.* Among the many reasons counseling restraint, the Court emphasized that the "collateral consequences of making international rules privately actionable argue for judicial caution." *Id.* at 725, 124 S. Ct. 2739. To provide a cause of action under the ATS, a customary international law tort must meet a "high bar" for recognizing new causes of action: it must be both specific and well-accepted. *Id.* We conclude that plaintiffs' ATS claim fails the second criterion.

To form the basis of a ATS suit, the alleged tort must be "defined with a specificity comparable to the features of the 18th-century paradigms" of torts in violation of the law of nations-violations of safe conducts, offenses against ambassadors, and piracy. *Sosa*, 542 U.S. at 725, 124 S. Ct. 2739; *id.* at 715,

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"support [for] a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by *Sosa*").

124 S. Ct. 2739 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769)). These paradigmatic examples involve offenses "principally incident to whole states or nations and not individuals seeking relief in court." *Id.* at 720, 124 S. Ct. 2739 (citations and internal quotation marks omitted). Plaintiff has pointed to no sources which evince support for the specific customary international law tort proposed here-detention without being informed of the availability of consular notification and access. *Cf. Vietnam Ass'n*, 517 F.3d at 119-23 (concluding that plaintiffs had failed to describe a relevant norm of customary international law with the requisite specificity). To the contrary, it appears that none of the States-parties to the Convention, "[w]ith one possible exception," recognize such a tort in their domestic law. *See* note 5 *ante*. Thus, it cannot be said that the tort proposed has "attained the status of a binding customary norm," *Sosa*, 542 U.S. at 737, 124 S. Ct. 2739; *see also Flores*, 414 F.3d at 248 ("[C]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."). Nor can it be said that imprisonment in violation of Article 36(1)(b)(third) is "so bad that those [who engage in this conduct] become enemies of the human race." *Sosa*, 542 U.S. at 737, 124 S. Ct. 2739.

We also note that this inquiry "involve[s] an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33, 124 S. Ct. 2739. This consideration weighs against recognition of plaintiff's proposed cause of action. A

customary international law tort for imprisonment in violation of Article 36(1)(b)(third) suffers from the same infirmities as the tort proposed in *Sosa:* "the label [enemy of the human race] would never fit the reckless policeman who botches his [notice of the availability of consular notification and access], even though that same officer might pay damages [for violating any applicable] municipal law." *Sosa*, 542 U.S. at 737, 124 S. Ct. 2739. Accordingly, we cannot recognize an ATS cause of action for the alleged violations of Article 36(1)(b)(third).

CONCLUSION

For the reasons stated above, we conclude that the obligation of detaining authorities to inform an alien of the consular notification and access requirements set forth in Article 36(1)(b)(third) of the Vienna Convention does not authorize an individual to vindicate in an action for damages a violation of Article 36(1)(b)(third) pursuant to § 1983, ATS, or directly under the Convention. Accordingly, the judgment of the District Court is **AFFIRMED.**

APPENDIX B

DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RICARDO A. DE LOS SANTOS MORA,

Plaintiff,

-against-

THE PEOPLE OF THE STATE OF NEW YORK; RICHARD A. BROWN, DISTRICT ATT., FLUSHING, QUEENS POLICE DEPT.,

Defendants.

----------x

MEMORANDUM AND ORDER
05-CV-5995 (RJD)

DEARIE, United States District Judge:

On December 5, 2005, Plaintiff filed the Instant complaint *pro se* pursuant to 28 U.S.C. § 1350, alleging that the arresting officers and the Queens County District Attorney violated the Vienna convention at the time of his 1992 arrest. He seeks $ 1 million in damages. The Court grants plaintiff's

request to proceed *in forma pauperis* but the complaint is dismissed for the reasons stated below.

Standard of Review

Section 1915A requires this Court to review the complaint in a civil action in which a prisoner seeks redress from officers or employees of a governmental agency and to "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b); *see Carr v. Dvorin*, 171 F.3d 115, 116 (2d Cir. 1999) (per curiam). An action is frivolous as a matter of law when, *inter alia*, it is based on an "indisputably meritless legal theory"— that is, when it "lacks an arguable basis in law . . . , or [when] a dispositive defense clearly exists on the face of the complaint." *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998).

Discussion

Vienna Convention

Plaintiff alleges that :

> the District Attorney Mr. Richard A. Brown and the arresting officers knew that Plaintiff is a citizen of the Dominican [R]epublic. At no time during the arrest, interrogation, or court appearances Plaintiff was advised of his Vienna Convention rights. [T]he District

> Attorney should have informed Plaintiff of his international right and failed to do so.

Complaint at 3.

Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, T.I.A.S. No. 6820, para. 1, requires a host state to notify the consul of a foreign state when a national of that foreign state is arrested. The United States is a signatory to that treaty. However, that treaty creates no fundamental rights for a foreign national. *See Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994). Generally, "there is a strong presumption against inferring individual rights from international treaties." *United States v. De la Pava*, 268 F.3d 157, 164 (2d Cir. 2001). The Vienna Convention was meant to protect the rights of states to care for their nationals traveling abroad, not to protect the rights of individuals. *See id.* at 164-65. Failure to notify the consul of a defendant's home country of the defendant's arrest is not a basis for dismissing an indictment. *Id.* at 165-66; *see also U.S. v. Hall*, No. CR-03-910, 2005 WL 1984463, *11 (E.D.N.Y. Aug. 17, 2005); *Moyhernandez v. U.S.*, No. 02 CIV. 8062, 2005 WL 351115, at *2 (S.D.N.Y. Feb. 09, 2005); *Polanco v. United States*, No. 99 Civ. 5739, 2000 WL 1072303, *6 (S.D.N.Y. Aug.3, 2000) ("[A] violation of the Vienna Convention's consular notice provision does not constitute a constitutional violation or a fundamental defect in the conduct of his trial."). Therefore, assuming the State did not notify the Dominican Consulate of plaintiff's arrest, the failure to comply with the Vienna Convention is not grounds for vacating a sentence. Accordingly,

plaintiff's complaint fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915A.

Conclusion

Accordingly, plaintiff's complaint is dismissed. 28 U.S.C. § 1915A. The Court certifies pursuant to 28 U.S.C. § 1915 (a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

Dated: Brooklyn, New York
12/30/2005

APPENDIX C

RELEVANT TREATY PROVISIONS

The preamble to the Vienna Convention on Consular Relations provides as follows:

> The States Parties to the present Convention,
>
> Recalling that consular relations have been established between peoples since ancient times,
>
> Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
>
> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
>
> Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of

functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows . . . .

Vienna Convention on Consular Relations, preamble, 21 U.S.T. 77, 79, 596 U.N.T.S. 261 (1969) (footnotes omitted).

Article 36 of the Convention provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or

detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id. art. 36, 21 U.S.T. at 100-01.

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No. 08-106

Supreme Court, U.S.
FILED
SEP 8 - 2008
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO A. DE LOS SANTOS MORA,

Petitioner,

-v.-

THE PEOPLE OF THE STATE OF NEW YORK;
RICHARD A. BROWN, DISTRICT ATTORNEY;
FLUSHING QUEENS POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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September 8, 2008

REPRINTED COPY

QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's dismissal of the complaint because the Vienna Convention on Consular Relations does not provide for a private cause of action for damages based on the failure of Respondents to advise Petitioner, a foreign national, of his right to have his consulate notified of his arrest and detention?

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No. 08-106

IN THE SUPREME COURT OF THE UNITED STATES

RICARDO A. DE LOS SANTOS MORA,

Petitioner,

-v.-

THE PEOPLE OF THE STATE OF NEW YORK; RICHARD A. BROWN, DISTRICT ATTORNEY; FLUSHING QUEENS POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

In this action brought under the Alien Tort Claims Act, 28 U.S.C. § 1350, Petitioner Ricardo A. De Los Santos Mora, a citizen of the Dominican Republic, alleges that the New York City Police Department and the Queens County District Attorney violated Article 36 of the Vienna Convention on Consular Relations by failing to advise him of his right to have the Dominican consulate notified of his arrest and detention on a charge of attempted first degree robbery.

Background

Article 36 of the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261 (ratified Nov. 24, 1969), provides in relevant part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
>
> . . .
>
> (b) if [the defendant] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

It is the policy of the City of New York to comply with the notification requirement in Article 36 of the Vienna Convention if the Police Department ascertains that a prisoner is not a United States citizen. The Police Department's Patrol Guide contains a procedure, No. 208-56, for the processing of arrests of aliens that includes a list of countries whose consulates or embassies

must be notified.[1] The prisoner's country of nationality is entered on line 12 of the Online Booking System Arrest Worksheet. The arresting officer then must determine if the prisoner's embassy or consulate is on the list of countries that must be notified. If so, the arresting officer then must contact the Inter-City Correspondence Unit and provide a member of the Unit with the pertinent information regarding the prisoner, including the prisoner's name, date and county of arrest, the charges, and the exact location where the prisoner is detained. The Inter-City Correspondence Unit member then must notify the embassy or consulate concerned.

In situations where notification is not mandated because the prisoner's country is not listed, the arresting officer is to inform the prisoner of the right to have his or her embassy or consulate notified. If the prisoner so requests, then the arresting officer is to follow the same procedure with the Inter-City Correspondence Unit.

Also, in either situation, the arresting officer's supervisor is to ensure that the arresting officer has contacted the Inter-City Correspondence Unit.

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[1] There was a scant record in the District Court because the matter was dismissed by the Court *sua sponte*. Respondents provided relevant portions of the New York Police Department Patrol Guide to the Circuit Court in a post-argument filing following a request by the Circuit Court for information on the Police Department's procedures with respect to foreign nationals who are arrested.

Finally, the Patrol Guide incorporates by reference Mayoral Executive Orders Nos. 34 and 41 regarding City policy concerning aliens.[2] In essence, these orders state the City's policy of providing essential services to all residents regardless of immigration status while complying with the federal law that the City may not prohibit its employees from providing information to the U.S. Bureau of Immigration and Customs Enforcement. Under the terms of the Executive Orders, law enforcement officers are not to inquire about a person's immigration status unless they are investigating illegal activity other than one's status as an undocumented alien.

The City's Department of Correction has a similar notification procedure for aliens that the Department has in its custody. Moreover, all New York City Police and Correction officers are trained at the academy level, as well as through refresher courses, on compliance with these procedures. Assistant District Attorneys also are trained on the notification requirement in Article 36 of the Vienna Convention.

The procedures currently employed by law enforcement officers in New York City are not substantially different from what was in effect at the time of Petitioner's arrest in 1992. Because of the long period of time between Petitioner's arrest and the commencement of his action in 2005, there are no records readily available to show what the

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[2] *See* http://search.citylaw.org/isysquery/873c3005-348e-457c-8b7d-258626c0cae0/4/doc/# and http://home2.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf

Police Department did in his particular case to comply with the treaty.

According to his complaint, Petitioner emigrated to the United States from the Dominican Republic in 1991 and retained his Dominican citizenship. Sometime in 1992 he was arrested in Flushing, Queens and charged with attempted first degree robbery. Petitioner claims that when he was arrested, he did not speak English and the police officers did not speak Spanish. He further claims that when he was brought to court, he was assigned counsel who also did not speak Spanish and that he was denied the services of an interpreter. Petitioner was ultimately sentenced to six months imprisonment and five years probation following a guilty plea that he claims was coerced.

Litigation History

On December 23, 2005, Petitioner commenced an action in the United States District Court for the Eastern District of New York. He claimed that the Police Department and Queens County District Attorney's Office violated Article 36 of the Vienna Convention because throughout the criminal proceeding – from arrest through interrogation and court appearances – no one ever advised him of his right to contact the Dominican consulate, nor did the Respondents contact the consulate on his behalf. Petitioner contended that the "outcome of [his] case would have been different if [he] had known of his Vienna Convention rights" and that the Respondents' "serious error" resulted in his incarceration. He sought $1 million in damages and permission to proceed *in forma*

pauperis. Before Respondents filed an answer, the District Court dismissed the complaint *sua sponte*.

The District Court's Order

In a memorandum dated December 30, 2005 (Appendix B), the District Court granted Petitioner's request to proceed *in forma pauperis* but dismissed the complaint pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief could be granted. The District Court said that Article 36 of the Vienna Convention did not confer rights to individuals but was intended to protect the rights of states to care for their nationals traveling abroad. Citing the Second Circuit's decision in *United States v. De La Pava*, 268 F3d 157 (2nd Cir. 2001), and decisions from the Eastern and Southern Districts of New York, the District Court held that violation of the Vienna Convention's consular notice provision was not grounds for vacating Petitioner's sentence.

The Order of the Circuit Court of Appeals

In a unanimous opinion issued on April 24, 2008 (Appendix A), the Second Circuit affirmed the District Court's order. *De Los Santos Mora v. New York*, 524 F3d 183 (2nd Cir. 2008). The Court noted that the Circuits were split on the question of whether Article 36 created judicially enforceable rights; the Fifth, Sixth, and Ninth Circuits had held that it did not, while the Seventh Circuit recently held that it did (Appendix A, pp. 7a-8a). It said that its most recent decision on the subject, *De La Pava*, did not definitively address the issue but only held that the failure of counsel to move for dismissal of an indictment based on an alleged violation of Article 36 was not ineffective assistance

of counsel providing grounds to vacate a conviction (*id.*, p. 8a).

The Court noted that the U.S. State Department surveyed United States embassies around the world and was unable to identify any party to the Vienna Convention that allowed an individual to sue for damages for a violation of Article 36 (*id.*, pp. 8a-9a). The State Department also reported that virtually no other country's domestic courts construed Article 36 to create a private right of action for its violation (*id.*).

Examining the text of the treaty, the Court said that Article 36 did not provide that notice of the rights under it was itself a right, nor was there any mention of whether private individuals could seek redress for the violation of the notice provision in the domestic courts of the States-parties (*id.*, p. 23a). Moreover, the Court said, the preamble clearly stated that the "purpose of such privileges and immunities [under the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States" (*id.*, p. 29a)

The Court further said that there was a presumption in its caselaw, as well as the law in other circuits, that unless there is express language, treaties do not create individual rights (*id.*, pp. 40a-42a). Also, it accorded "great weight" to the views of the United States Departments of State and Justice, which had submitted a joint *amicus curiae* brief arguing that Article 36 did not grant individual rights that were enforceable in court (*id.*, p. 46a).

Finally, the Court said that it was not bound by the holding of the International Court of Justice in *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31) that Article 36 granted foreign nationals an individual right that could be asserted in the domestic courts of the United States (*id.*, p. 50a).

REASON FOR DENYING THE PETITION

THE SECOND CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S ORDER DISMISSING THE COMPLAINT BECAUSE THE VIENNA CONVENTION ON CONSULAR RELATIONS DOES NOT PROVIDE FOR A PRIVATE CAUSE OF ACTION FOR DAMAGES BASED ON THE FAILURE OF RESPONDENTS TO ADVISE PETITIONER OF HIS RIGHT TO HAVE DOMINICAN OFFICIALS NOTIFIED OF HIS ARREST AND DETENTION.

This Court has left open the question of whether Article 36 of the Vienna Convention creates individually enforceable rights. In *Breard v.* Greene, 523 US 371, 376 (1998) (*per curiam*), the Court held that Article 36 "arguably confers on an individual the right to consular assistance following arrest," and that treaties are on the "same footing" as federal statutes. But the Court also said that there could be no remedy without a showing of prejudice. *Id.* at 377. In *Sanchez-Llamas v. Oregon*, 548 US 331 (2006), the Court assumed without deciding that the Vienna Convention creates judicially enforceable rights, but held that suppression of evidence was not a proper remedy for a violation of Article 36.

Most recently, in *Medellin v. Dretke*, -- US --, 128 SCt 1346 (2008), this Court reiterated that assumption but again left it unresolved. 128 SCt at 1357, n. 4. The main holding in *Medellin* was that decisions from the International Court of Justice, and specifically *Avena*, were not binding on state courts and so did not preempt state limitations on the filing of successive habeas petitions.

The Circuit Courts have mainly left the question unresolved or decided that the Vienna Convention does not confer individual rights. *See, e.g., Cornejo v. County of San Diego, et al.*, 504 F3d 853 (9th Cir. 2007) (holding that Article 36 does not create a private right of action under 42 U.S.C. § 1983); *United States v. Duarte-Acero*, 296 F3d 1277, 1281-1282 (11th Cir.), *cert. denied*, 537 US 1038 (2002) (dismissal of an indictment is "simply unavailable" because "Vienna Convention itself disclaims any intent to create individual rights," as stated in the Preamble, and the "Convention nowhere suggests that the dismissal of an indictment is an appropriate remedy for a violation."); *United States v. Emuegbunam*, 268 F3d 377, 388-394 (6th Cir. 2001), *cert. denied*, 535 US 977 (2002) (no individual rights under the treaty, so no remedy of dismissal of an indictment or reversal of a conviction for a violation of Article 36); *United States v. Li*, 206 F3d 56, 61 (1st Cir.) (*en banc*), *cert. denied*, 531 US 956 (2000) ("[d]efendants who assert violations of a statute or treaty that does not create fundamental rights are not generally entitled to the suppression of evidence unless that statute or treaty provides for such a remedy.")

On the other hand, the Seventh Circuit recently held that there is a private cause of action under section 1983 for the violation of the Vienna Convention. *See Jogi v. Voges*, 480 F3d 822 (7th Cir. 2007).

In *De La Pava*, the Second Circuit explained that there is generally a "strong presumption against inferring individual rights from international treaties," given that "'[a] treaty is primarily a compact between independent nations'" that "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" 268 F3d at 164, quoting *Head Money Cases*, 112 US 580, 598 (1884). Quoting from its earlier decision in *United States ex. rel. Lujan v. Gengler*, 510 F2d 62, 67 (2nd Cir.), *cert. denied*, 421 US 1001 (1975), the Court went on to say that rights arising from treaty provisions "are, under international law, those of the states and...individual rights are only derivative through the states." 268 F3d at 164. The Court also quoted from Restatement (Third) of the Foreign Relations Law of the United States, § 907 cmt a: "International agreements...generally do not create private rights or provide for a private cause of action in domestic courts". *Id.*

In addition, in *De La Pava*, as in the present case, the Court said that "[t]he preamble to the Vienna Convention supports the view that the Convention created no judicially enforceable individual rights." *Id.* The preamble reads, in pertinent part:

> Believing that an international convention on consular relations,

> privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
>
> Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,...

The Court added that "Article 36 itself specifically states that the provisions of that Article are framed 'with a view to facilitating the exercise of *consular functions* relating to nationals of the sending State,'" which indicates that the article was intended "to protect a state's right to care for its nationals." *Id.* at 164-165 (emphasis by the Court).

Furthermore, the Court accorded the required "substantial deference" to the State Department's interpretation that the Vienna Convention "created state-to-state rights and obligations, not judicially enforceable individual rights." *Id.* at 165, n. 6. The Court also noted that the negotiations over Article 36 emphasized the rights of states, particularly the potential administrative burden that consular notifications would make on a state with a large dispersed immigrant population, and that the Senate Report on the Convention opined that the treaty "does not change or affect present U.S. laws or practice." *Id.* at 165, n. 7.

The Court went on to hold that "[e]ven if we assume arguendo that De La Pava had judicially enforceable rights under the Vienna Convention – a position we do not adopt – the Government's failure to comply with the consular-notification provision is not grounds for dismissal of the indictment." *Id.* at 165. Noting that dismissal had "been available only in cases implicating the most fundamental of rights," the Court emphasized that, as it previously held in *Waldron v. INS*, 17 F3d 511 (2nd Cir. 1994), the "consular-notification provision of the Vienna Convention and its related regulations do not create any 'fundamental rights' for a foreign national." 268 F3d at 165, citing *Waldron*, 17 F3d at 518.

In *Waldron*, the Second Circuit interpreted 8 C.F.R. § 242.2(g), which reiterates the requirements of Article 36 by requiring the Immigration and Naturalization Service to notify a detained alien of his right to contact consular officials. The Court held that noncompliance with that regulation did not require reversal of a Board of Immigration Appeal's decision to deport an alien because, "although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origin to concepts of due process." *Waldron*, 17 F3d at 518.

In this case, the District Court and the Circuit Court correctly held that Article 36 of the Vienna Convention does not create individual rights or provide for a private cause of action for damages due to non-compliance. Four of the five other Circuit Courts that have addressed this issue have agreed. The Seventh Circuit's decision in *Jogi*

is an outlier that does not significantly undermine the rationale of the Second Circuit in this case and the other Circuits that reached the same conclusion, and should not be considered a sufficient basis for finding that there is a conflict among the Circuits that must be resolved by this Court. Moreover, we respectfully urge this Court to defer to the expertise of the U.S. Departments of State and Justice on this subject.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
September 8, 2008

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No. 08-106

IN THE

Supreme Court of the United States

RICARDO A. DE LOS SANTOS MORA,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
RICHARD A. BROWN, DISTRICT ATTORNEY, AND
FLUSHING QUEENS POLICE DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The court below held that Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261 (1969), does not create a judicially enforceable right to be informed of the entitlement to consular notification and communication. As respondents acknowledge, that holding deepens a conflict among the courts of appeals: the court of appeals' decision is consistent with decisions of four other circuits, but it squarely conflicts with the Seventh Circuit's decision in *Jogi v. Voges*, 480 F.3d 822 (2007). Respondents also do not deny that the question presented is a recurring one of national and international importance. Nor do they dispute that this case presents a favorable vehicle for reviewing that question.

Respondents nonetheless oppose review based on their view that the Seventh Circuit's decision in *Jogi* is an "outlier." Br. in Opp. 12. But this Court does not refrain from resolving a circuit conflict on a recurring and important issue simply because most circuits have lined up on one side of the split. Indeed, when this Court previously granted review on the same issue in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the nature of the conflict was essentially the same—with several courts having held that Article 36 fails to confer judicially enforceable rights and the Seventh Circuit in *Jogi* having reached the opposite conclusion.

Moreover, the view adopted by the Seventh Circuit is not an "outlier." The only four Justices who have reached a conclusion on the question have agreed with the Seventh Circuit's view; one circuit reaching the opposite conclusion has acknowledged

that there are strong arguments in favor of the Seventh Circuit's position; concurring and dissenting judges in other cases have agreed with the Seventh Circuit's position; and so, too, has the International Court of Justice (ICJ).

Respondents also contend that review should be denied because the court of appeals correctly held that Article 36 does not create any individual rights. Respondents' merits-based argument, however, should be considered after the Court grants review, and provides no basis for denying review in a case that squarely presents a recurring and important question as to which the courts of appeals are divided. Respondents' argument on the merits, in any event, simply ignores the many flaws in the Second Circuit's reasoning identified in the petition.

1. The court of appeals in this case squarely held that Article 36 of the Vienna Convention does not grant a detained foreign national a judicially enforceable right to be informed of his entitlement to consular notification and communication. As respondents acknowledge, the Circuits are divided on this question. *See* Br. in Opp. 6, 11-12. In particular, while four other courts of appeals have agreed with the Second Circuit that Article 36 does not confer an individual right to be informed of the entitlement to consular notification and communication, the Seventh Circuit has expressly held that it does. *See* Pet. 9-13; Br. in Opp. 9, 11-12. The Seventh Circuit had an opportunity to consider the issue en banc after the initial panel opinion in *Jogi*, but no judge voted to grant en banc rehearing and the court therefore denied en banc review. *Jogi*, 480 F.3d at 824-25 & n.*. In addition, the Seventh Circuit recently reiterated its holding in *Jogi* in a decision is-

sued after the filing of the petition for a writ of certiorari. *See Osagiede v. United States*, No. 07-1131, 2008 WL 4140630, at *5, *7 & n.8 (7th Cir. Sept. 9, 2008).

The conflict among the courts of appeals warrants review. There is an important national interest in ensuring the uniform treatment of foreign nationals under an international treaty. That interest in uniformity is fatally compromised when foreign nationals in one circuit have a judicially enforceable right to be informed of their entitlement to consular notification and communication, while foreign nationals in five other circuits do not. To rectify that disparate treatment and to ensure uniformity in our Nation's treatment of foreign nationals, this Court should grant review.

2. Respondents also do not deny that the question presented is one of recurring national and international importance. Nor could they. This case presents "an important issue of federal law that has arisen hundreds of times in the lower federal and state courts." *Sanchez-Llamas*, 548 U.S. at 371 (Breyer, J., dissenting); *Medellín v. Dretke*, 544 U.S. 660, 673 (2005) (O'Connor, J., dissenting) (issue is of "national importance" and is "bound to recur"). The steady stream of challenges under Article 36 of the Vienna Convention has not abated. To the contrary, in addition to the cases already cited, *see* Pet. App. 16a n.12; Pet. 14 & n.4, another court confronted the issue within a week of the docketing of the petition for certiorari. *See McPherson v. United States*, No. 07-6119, 2008 WL 2985448, at *6-9 (D.N.J. July 31, 2008) (action for damages under § 1983).

Respondents assert that the City of New York has a written policy that requires compliance with Article 36. Br. in Opp. 2-4. But they offer no evidence that this policy has been implemented effectively; and the available evidence is to the contrary. Respondents assert that their policy has remained substantially the same since 1992. *Id.* at 4. Yet they do not challenge the results of a study that revealed only 4 instances of consular notification among more than 53,000 arrests of foreign nationals in New York City in 1997.[1] Nor do they offer any evidence that the situation has improved, in New York City or elsewhere. As long as noncompliance with Article 36 remains a "vexing problem," this Court's review is needed to address "questions that will inevitably recur" concerning the rights of arrested foreign nationals. *Medellín*, 544 U.S. at 674-75 (2005) (O'Connor, J., dissenting). "[G]iven its importance," the Court should resolve the question presented in this case. *Sanchez-Llamas*, 548 U.S. at 371 (Breyer, J., dissenting).

3. This case also presents a particularly suitable vehicle for resolving that question. The court of appeals resolved this case on the threshold ground that Article 36 does not confer on foreign nationals a judicially enforceable right to notice of their entitlement to consular notification and communication. *See* Pet. App. 20a-22a, 35a-36a n.23. The court explicitly declined to resolve the subsequent question whether petitioner may seek damages under 42 U.S.C.

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[1] Mark Warren, *Human Rights Research, Foreign Nationals and the Death Penalty in the United States* (updated Feb. 29, 2008), *available at* http://www.deathpenaltyinfo.org/article.php? did=198&scid=31.

§ 1983, and even suggested that if petitioner in fact "has an individual right under the Convention," then "his claim for damages pursuant to § 1983 would likely be actionable." *Id.* Accordingly, this case squarely presents only the threshold question that has divided the courts of appeals. Respondents do not suggest otherwise.

This case also presents that issue in the favorable posture of a dismissal for failure to state a claim. For purposes of such a dismissal, the allegations in the complaint must be assumed to be true. *Erickson v. Pardus*, 127 S. Ct. 2197, 2197 (2007) (per curiam). And petitioner's allegations present the purely legal question whether Article 36 gives a foreign national a right to be informed of his entitlement to consular notification and communication. See Pet. 23. Respondents again do not contend otherwise.

4. While respondents acknowledge the conflict in the circuits and do not deny the importance of the issue or the suitability of this case as a vehicle for resolving it, they nonetheless oppose review. Respondents rest their opposition primarily on their view that the Seventh Circuit's decision in *Jogi* is an "outlier." Br. in Opp. 12. That basis for opposing review is unpersuasive.

A circuit split on a recurring issue of national and international importance falls within the core of cases warranting the Court's review. The pressing need for review in such circumstances does not vanish simply because most circuits have come out on one side of the split. The reason is apparent. Like any other circuit split, a split in which most circuits are on one side frustrates the uniform application of federal law. And that lack of uniformity is particu-

larly damaging when, as here, the conflict implicates the obligations of the United States under an international treaty. *See* Br. of Honduras, et al. as *Amici Curiae*, *Bustillo v. Johnson*, No. 05-51, at 11 (Sept. 23, 2005), *available at* 2005 WL 2376680.

Indeed, in *Sanchez-Llamas*, 548 U.S. at 342, this Court agreed to review the precise question presented in this case even though the nature of the split was essentially the same as it is today. At that time, two federal courts of appeals and three state supreme courts had already concluded that Article 36 creates no judicially enforceable rights, while the Seventh Circuit in *Jogi* was the lone court of appeals to have held that a "defendant can bring [a] Convention claim in [a] judicial proceeding." *Id.* at 371 (Breyer, J., dissenting). Nonetheless, recognizing the conflict of authority on an important question, the Court "granted the petitions for certiorari in significant part in order to decide" whether Article 36 confers judicially enforceable individual rights. *Id.* There is no reason for a different result here.

That is particularly true because there is nothing unusual about the grant of certiorari in *Sanchez-Llamas*. This Court has not hesitated to grant review in other cases involving circuit conflicts in which most circuits were on one side of the split. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). And such grants have not infrequently resulted in the Court adopting the view of the single outnumbered court of appeals. *See Dixon v. United States*, 548 U.S. 1, 27 (2006) (Alito, J., dissenting) (majority accepted a position rejected by 8 of 9 circuits); *Henderson v. United States*, 517 U.S. 654, 677-78 & n.2 (1996) (Scalia, J., dissenting) (majority accepted a position rejected by 4 of 5 circuits).

Moreover, the interpretation of Article 36 adopted by the Seventh Circuit cannot be fairly characterized as an "outlier." In *Sanchez-Llamas*, all four Justices who reached the issue concluded that Article 36 creates judicially enforceable individual rights. 548 U.S. at 371-78 (Breyer, J., dissenting). In addition, a majority of the Court agreed in *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam), that "[t]he Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest." *Id.* at 376. In *Medellín*, Justice O'Connor, joined by three other Justices, found substantial support for the conclusion that Article 36 creates individual rights in the treaty's text and structure. 544 U.S. at 675-88 (O'Connor, J., dissenting).

In addition, the Eleventh Circuit, while ultimately agreeing with the conclusion reached by the court below, acknowledged that the "arguments in favor of individual rights under the Treaty are impressive." *Gandara v. Bennett*, 528 F.3d 823, 827 (2008). Concurring and dissenting judges in that case and others have echoed the Seventh Circuit's view that Article 36 creates enforceable individual rights. *See, e.g.*, *Cornejo v. County of San Diego*, 504 F.3d 853, 864-73 (9th Cir. 2007) (Nelson, J., dissenting); *United States v. Li*, 206 F.3d 56, 68-76 (1st Cir. 2000) (en banc) (Tourella, C.J., concurring in part and dissenting in part); *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring), *aff'd sub nom.*, *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); *see also United States v. Lombera-Camorlinga*, 206 F.3d 882, 890 (9th Cir. 2000) (en banc) (Boochever, J., dissenting); *Gandara*, 538 F.3d at 835-39 (Rodgers, J., specially concurring). And the ICJ, in an opinion that is entitled to "respectful

consideration," *Sanchez-Llamas*, 548 U.S. at 333, has likewise concluded that Article 36 grants arrested foreign nationals an individual right that may be "asserted . . . within the domestic legal system of the United States." *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 21). That judicial authority belies respondents' claim that the Seventh Circuit's decision constitutes an "outlier."

5. Respondents also argue that review should be denied because the Second Circuit correctly held that Article 36 does not create individual rights. Br. in Opp. 11. Such a merits-based argument, however, provides no basis for declining to resolve a circuit conflict on a recurring issue of national and international importance. Respondents' arguments on the merits can be considered after the Court grants review.

Respondents, moreover, make no effort to address the flaws in the Second Circuit's reasoning identified in the petition for certiorari. In particular, respondents offer no response to the points that: (i) Article 36 uses rights-creating language, Pet. 16; (ii) this Court has interpreted treaties using similar language to create individual rights, *id.* at 18-19; (iii) recognition of individual rights furthers the general purposes of the Vienna Convention to promote consular functions, *id.* at 19-20; (iv) this Court's cases contain no presumption against reading treaties to create individual rights, *id.* at 21-22; (v) the ICJ's ruling weighs in favor of an individual rights reading, *id.* at 20; and (vi) determinations of the Executive Branch are not controlling in circumstances like those present here, *id.* at 22.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

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